TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~912.~~ 529

JOHN H. DURLAND, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED FEBRUARY 15, 1895.

(15,796.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 1, 1895.

1 In the District Court of the United States for the Eastern District of Pennsylvania.

Pleas before the Honorable the Judge of said Court of —, November Sessions, 1894, No. 20.

It is thus contained:

THE UNITED STATES
vs.
JOHN H. DURLAND. } Indictment.

Be it remembered that at a district court of the United States in and for the eastern district of Pennsylvania, holden at Philadelphia, on the nineteenth day of November, A. D. 1894, before the Honorable William Butler, judge of said court, by the oaths of William H. Lambert, George Allen, Melvin R. Brown, Charles H. Duttera, Jacob Enders, Benjamin L. Jordan, Benjamin F. Kending, Frank La Lanne, Harry A. Randall, Charles H. Ruhe, Daniel Schweyer, and by the affirmations of William Bertram, John W. Chalfant, Levi Engle, George E. Fort, Caleb R. Heyburn, Eugene James, Tobias D. Martin, Benjamin Tomlinson, Samuel P. Webb, and John E. Weitzel, good and lawful men of the said district, then and there empaneled and sworn or affirmed and charged to inquire for the said The United States and for the body of said district—

2 It is presented as follows:

In the District Court of the United States for the Eastern District of Pennsylvania, November Sessions, 1894, No. 20.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

The grand inquest of the United States of America, inquiring in and for the eastern district of Pennsylvania, upon their respective oaths and affirmations respectively do present that heretofore, to wit, upon the seventh day of September, in the year of our Lord one thousand eight hundred and ninety-four, one John H. Durland, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, and falsely devise a scheme and artifice to defraud—that is to say, by divers false pretences and subtle means and devices to obtain and acquire for himself of and from another person, to wit, one W. S. Burk, at Chester, Pennsylvania, a large sum of money, to

3 wit, the sum of sixty dollars, and to cheat and defraud the said W. S. Burk thereof by then and there representing, among other things, that the Provident Bond and Investment Company would pay to the said W. S. Burk a large sum of money, to wit, the sum of one hundred dollars, if he, the said W. S. Burk, would within ten months pay to the said Provident Bond and Investment Company a sum less than the sum of one hundred, to wit, the sum of sixty, dollars—

Whereas in truth and in fact the said John H. Durland did not intend that the said Provident Bond and Investment Company would pay to the said W. S. Burk a large sum of money, to wit, the sum of one hundred dollars, if he, the said W. S. Burk, would pay to the said Provident Bond and Investment Company a sum less than one hundred dollars, to wit, the sum of sixty dollars, within ten months, as he, the said John H. Durland, then and there well knew, but he, the said John H. Durland, intended then and there by said false representations to obtain for his own use the said sum of sixty dollars from the said W. S. Burk and to cheat and defraud the said W. S. Burk thereof;

4 Which said scheme and artifice to defraud was to be effected by him, the said John H. Durland, opening a correspondence and communication with another person, to wit, the said W. S. Burk, residing within the United States, to wit, at Chester, Pennsylvania, by means of the post-office establishment of the United States and by inciting the said W. S. Burk to open communication with him, the said John H. Durland, so devising and intending; and he, the said John H. Durland, did heretofore, to wit, upon the day and year aforesaid, so devising and intending in and for executing such scheme and artifice to defraud and attempting so to do, place and cause to be placed a letter in the post-office establishment of the United States, to wit, the post office at Philadelphia, Pennsylvania, within the above district, which said letter was then and there addressed and directed as follows, to wit: "Mr. W. S. Burk, Chester, Pa.," profert whereof is now made, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

2. And the grand inquest aforesaid, inquiring as aforesaid,

5 upon their respective oaths and affirmations as aforesaid do further present that heretofore, to wit, upon the twentieth day of July, in the year of our Lord one thousand eight hundred and ninety-three, the said John H. Durland, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, and falsely devise a scheme and artifice to defraud—that is to say, by divers false pretences and subtle means and devices to obtain and acquire for himself of and from divers other persons to this grand inquest unknown a large sum of money, to wit, the sum of five hundred dollars each, and to cheat and defraud the said divers other persons thereof by then and there representing, among other things, that the Provident Bond and Investment Company would pay to each of the said divers other persons the sum of one thousand dollars if each of the said persons would pay to the said Provident Bond and Investment Company a sum of money less than the sum of one thousand dollars, to wit, the sum of five hundred dollars—

Whereas in truth and in fact the said John H. Durland did not then and there intend that if the said divers other persons

6 should each pay to the said Provident Bond and Investment Company a sum of money, to wit, the sum of five hundred dollars, the said Provident Bond and Investment Company would

pay to each of the said divers other persons a large sum of money, to wit, the sum of one thousand dollars, as he, the said John H. Durland, then and there well knew, but he, the said John H. Durland, intended then and there by said false representations to obtain for his own use the said sum of five hundred dollars from each of the said divers persons and to cheat and defraud the said divers persons thereof;

Which said scheme and artifice to defraud was to be effected by him, the said John H. Durland, opening a correspondence and communication with the said divers persons by means of the post-office establishment of the United States and by inciting such divers other persons to open communication with him, the said John H. Durland, so devising and intending; and he, the said John H. Durland, did heretofore, to wit, upon the day and year last aforesaid, so devising and intending in and for executing such scheme and artifice to defraud and attempting so to do, place and cause to be
7 placed in the post office of the United States at Philadelphia, to be sent and delivered by the said post-office establishment, divers letters and packets, to wit, twenty letters and packets, directed respectively to the said divers persons, the names and addresses of whom are to this grand inquest unknown, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

ELLERY P. INGHAM,
U. S. Attorney.

19 November, 1894.

8 Whereupon Alexander P. Colesberry, Esq., the marshal of the said district, is commanded that he apprehend and take the body of the said John H. Durland to answer the premises; which said indictment the said the Honorable William Butler, judge of the district court of the United States of America for the eastern district of Pennsylvania as aforesaid, afterwards, to wit, at the November sessions of the said the district court of the United States for the eastern district of Pennsylvania as aforesaid, holden for the district aforesaid, at Philadelphia, the nineteenth day of November, in the year of our Lord on- thousand eight hundred and ninety-four, did deliver here in court of record, in form of law to be determined; and thereupon, at the said November sessions of the said the district court of the United States for the eastern district of Pennsylvania, at Philadelphia, in the district aforesaid, on the twenty-eighth day of November, in the year of our Lord one thousand eight hundred and ninety-four, before the Honorable William Butler, judge as aforesaid, comes the said John H. Durland pursuant to recognizances by himself and his pledge-s before that entered into, and William C. Grass, Esquire, attorney of the said John H. Durland in this behalf, also comes and moves that the said indictment so as aforesaid specified and charged against the said John H. Durland be quashed for the reasons as set forth in the words and matter following, to wit:

9 And the said John H. Durland in his own proper person personally cometh here into court and, having heard said indictment read, moves the court to quash the same, and in support of said motion assigns the following reasons:

1. Because the said John H. Durland was bound over simply to answer the charge of depositing a letter and circular in the post office of the United States in relation to an enterprise similar to a lottery, whereas the said bill of indictment consists solely of charges which are separate and distinct from the said offence for which he, the said John H. Durland, was bound over.

2. Because the said indictment, as to the first count, fails to set out a description of the said alleged letter or contents thereof alleged to have been addressed to said W. S. Burk.

10 3. Because as to the second count of said indictment it fails to set out specifically and particularly the alleged twenty letters and packets alleged to have been deposited in the post office at Philadelphia or the alleged name or names of the person or persons to whom the same are alleged to have been addressed.

4. Because the said bill of indictment is otherwise informal, bad, and defective; all of which matters and things said defendant is ready to verify.

Wherefore, for want of a sufficient indictment in this behalf, the defendant further moves the court for his discharge by the court from the said premises.

WM. C. GROSS, *For Def't.*

11 And thereupon, afterwards, to wit, on the day and year last mentioned aforesaid, before the said the Honorable William Butler, judge as aforesaid, arguments on the motion to quash the aforesaid indictment having been heard by the court here and due consideration having been given to the subject, the motion to quash the indictment aforesaid, so as aforesaid made in behalf of the said John H. Durland, is overruled; and thereupon, afterwards, on the same day, before the said the Honorable William Butler, judge as aforesaid, comes the said John H. Durland, appearing at the bar of the court in his proper person, and he, the said John H. Durland, concerning the premises in the said indictment above specified and charged on him as above, being asked in what manner he would be acquitted thereof, says that he is not guilty thereof; and hereupon, for good or ill, he puts himself upon the country, and Ellery P. Ingham, Esquire, attorney of the United States of America for the eastern district of Pennsylvania in this behalf, doth the like; therefore let a jury immediately come before the said the Honorable William Butler, the said judge above named, here, by whom the truth of the matter will be better known and who have no affinity to the said John H. Durland, to recognize upon their oaths

12 and affirmations whether the said John H. Durland be guilty of the premises in the indictment aforesaid above specified or not, because as well the said Ellery P. Ingham, Esquire, who prosecutes for the said The United States of America in this behalf as aforesaid, as the said John H. Durland have put themselves upon

that jury; and the jurors by the said marshal for this purpose impanelled and returned, to wit, John Crankshaw, Sr., Chalkley Styer, Stephen Cloud, F. Bowman Price, William Durkin, Edward Hehl, John Seldomridge, John E. C. Miller, Edward I. Hunt, Henry B. Derrickson, Christian Lapp, Charles Perine, being called, come, who, being chosen, tried, sworn, and affirmed to speak the truth of and upon the premises aforesaid in the indictment aforesaid above specified, do say upon their oaths and affirmations that the said John H. Durland is guilty of the premises in the indictment aforesaid above specified in manner and form as he stands charged; and thereupon the said John H. Durland is committed to the said marshal.

And thereupon, at the said November sessions of the said court for the said district, held, as aforesaid, on the eleventh day of December, in the year of our Lord one thousand eight hundred and ninety-four, before the said the Honorable William Butler, judge as aforesaid, comes the said John H. Durland, by William
13 C. Gross, William F. Harrity, James M. Beck, and Hampton L. Carson, Esquires, and says that the verdict aforesaid, so as aforesaid found and rendered against the said John H. Durland, ought not to stand, and that judgment thereon ought to be arrested, and that a new trial of the issue ought to be granted for the reasons as set forth in the words and matter following, to wit:

14 D. C. of U. S., E. D. of Pa., Nov. Sessions, 1894.

UNITED STATES
vs.
JOHN H. DURLAND. } No. 20.

And now, to wit, Dec. 11th, 1894, Wm. C. Gross, *pro* defendant, moves for a new trial and in arrest of judgment in above case and assigns the following reasons:

1. The learned judge erred in permitting the district attorney to offer testimony in relation to the organization and management of the Mutual Saving and Distribution Fund Association of New York.

2. The learned judge erred in permitting the district attorney to frame questions by reading from copies of the New York Herald.

3. The learned judge erred in admitting evidence in relation to the principles upon which the Mutual Saving and Distribution Fund Association of New York was conducted.

4. The learned judge erred in permitting the district attorney to introduce any testimony whatever in relation to any matter or thing or in relation to any association or company which the defendant had organized or with which he had been associated
15 other than the Provident Bond and Investment Co.

5. The learned judge erred in saying, "It would be legitimate to show, if it is the fact, that the defendant and his business was attacked in the newspapers as an illegitimate business."

6. The learned judge erred in permitting the district attorney to offer testimony in relation to the expenses of the Provident Bond and Investment Co.

7. The learned judge erred in permitting the district attorney to ask the witness D. J. Sandham whether the Provident Bond and Investment Company used the U. S. mail in connection with its business.

8. The learned judge erred in not permitting defendant's witness P. O. Blyler to answer the following question, to wit: "What is your opinion as to the possibility of the company carrying out its contracts?"

9. The learned judge erred in permitting testimony to be offered in relation to the Equitable Bond Company of Washington, D. C.

10. The learned judge erred in permitting the district attorney to ask the defendant questions in relation to his domestic affairs and the custody of his boy.

11. The learned judge erred in overruling the defendant's offer to show by the witness Isaac Johnson as follows: "I also offer to show that this witness, at the request of his client, made an investigation of the legality of the company and made his report to his client, and that on the strength of his report the client became an agent of the company and a bondholder."

12. The learned judge erred in not permitting the defendant to show by the witness D. H. Sleem that the scheme was practicable.

16 13. The learned judge erred in overruling the defendant's motion to quash the indictments.

14. The learned judge erred in permitting the Government to offer evidence under the indictments.

15. The learned judge erred in permitting the Government to offer evidence to the mailing of pamphlets of the Provident Bond and Investment Co. without the same being described in the indictments.

16. The verdict was against the evidence.

17. The verdict was against the law.

WM. C. GROSS, *Pro Def't.*

17 UNITED STATES *vs.* JOHN H. DURLAND. } No. 20.

Surmotion in Arrest of Judgment.

John H. Durland, by his counsel, William C. Gross, Harrity & Beck, and Hampton L. Carson, files the following additional reasons in support of his fourth reason already filed, namely, that the said bills of indictment are otherwise informal, bad, and defective:

Fifth. Because the said bills of indictment do not charge any offense under — 5480, R. S., or any other law of the United States.

Sixth. Because the said bills of indictment do not set forth any scheme or artifice to defraud within the meaning of the act of Congress.

Seventh. Because the said bills of indictment charge more than

one separate and distinct offense in the first and second counts
18 in the bill of indictment No. 19 and the bill of indictment No. 20.

Eighth. Because each of said bills of indictment charge- more than three offenses, contrary to the act of Congress.

Ninth. Because it is not alleged that the various offenses charged within the said bills of indictment were committed within the same six calendar months.

WILLIAM C. GROSS,
HARRITY & BECK,
HAMPTON L. CARSON,
Att'ys for Defen't.

And thereupon, at the said November sessions of the said district court, held, as aforesaid, on the fifteenth day of January, in the year of our Lord one thousand eight hundred & ninety-five, before the said the Honorable William Butler, judge as aforesaid, comes the said John H. Durland, appearing as aforesaid, who is committed as aforesaid; and thereupon, arguments having been heard and due consideration having been given to the subject, the court is of opinion that the verdict aforesaid ought to stand, and that a new trial ought not to be granted, but that judgment ought to be en-
19 tered and given on said verdict for the reasons as set forth in the words and matter following, to wit:

UNITED STATES *vs.* JOHN H. DURLAND. } Motion in Arrest of Judgment and for New Trial.

When called upon to plead, the defendant moved to quash the indictments for reasons specified and filed.

The motion was overruled.

After verdict he moved for a new trial and in arrest of judgment for reasons assigned, including those specified in the motion to quash.

These reasons and others not specified at the time are now urged with great earnestness in the defendant's behalf. I will not discuss the questions raised at any length. They have, so far as material, been considered in the cases about to be cited.

Of the reasons specified for quashing, the first is wholly immaterial and the second and third cannot be sustained. They are fully met by United States *vs.* Fleming, Pagin's Fed. Prac. & Forms, p. 255. That case was reviewed and affirmed, and I adopt its conclusions respecting the matter here involved.

Of the reasons for new trial and arrest of judgment I need
20 do little more than say that I cannot sustain them. In considering the 1st, 3rd, 4th, & 5th it must be borne in mind that the business in New York therein referred to was identically the same as that transacted here; that it was, as the defendant testified, transferred here when driven away from there, and also to remember in this connection and in considering the 9th specification that a vital question in the case was whether the defendant

was himself deceived respecting the scheme—that is, whether he believed it to be legitimate and honest, though in fact it was not. Under these circumstances it was deemed important to know what the defendant's knowledge and experience in this regard had been. For the same reason it was deemed proper to admit evidence that he had been attacked and the business denounced as dishonest, and his attention thus directed to its character. Of course his answer to the attack was also heard. In U. S. *vs.* Stickle, 15th Fed. Rep., 798, where the defendant was on trial (under the statute here involved) and his intentions and the nature of his business were subjects of inquiry, the prosecution was permitted to prove a previous indictment and plea of guilty for a like offense.

As respects the 2nd specification I need only say that it is inaccurate. The dist. attorney was not allowed to read from the attacks referred to, though doubtless some of his questions were based upon what he found in these attacks. The court forbade reading the attacks or any part of them.

The 7th, 8th, & 11th do not seem to require comment.

The 10th is directed against the latitude allowed in cross-examining the defendant. He came on the stand as a witness
21 and thus rendered himself liable to examination respecting his past conduct, so far as it might tend to shed light on his character and credibility. How far such examinations should go is matter for the discretion of the court. I do not think the discretion was abused in this instance. A striking illustration of the extent to which such examinations are sometimes carried is found in Tilton *vs.* Beecher (reported in a volume called "The Tilton-Beecher Trial"). The judge who sat was of distinguished character as a jurist and the counsel engaged were among the most eminent of their time. All the material events of the parties' lives were brought out on cross-examination, several days being devoted to this object alone.

The 12th assignment is (unintentionally) misleading. The witness was under cross-examination, and the question was deemed improper at the time. Whether he might have been examined on the subject if called by the defendant would have depended on his qualifications as an expert. The counsel were informed by the court (to avoid possible misunderstanding) that expert testimony respecting the scheme, its nature, feasibility, &c., was admissible and would be received if offered.

The 6th, 13th, 14th, 15th, & 17th specifications do not call for comment.

In addition to the reasons filed and above noticed, the defendant's counsel urge two others, on which they seem to place most reliance: 1st, that neither bill charges an offence under the statute; 2nd, if it does, more than three offences (the statutory limit) are embraced.

The 2nd is purely technical, and if correct in point of fact cannot be allowed after verdict. If true, the defendant has suf-
22 fered no injury from this cause. If embarrassed in preparing his defense he should have called attention to it at that time,

when the Government could have cured the defect, if one existed, without losing its right to punish the defendant if found guilty, as it must do if the reason is now allowed and judgment arrested. United States *vs.* Nye, 4 Fed. Rep., 888; Pickering *vs.* Miss., 47 Mo., 461; House *vs.* Lowell, 45 Mo., 381; Com. *vs.* Tuck, 20 Pickering (Mass.), 356; 13 Lea (Tenn.), 103; Bishop Crim. Pro., vol. 1, sec. 442; Revised Statutes, sec. 1025.

As respects the first of the additional reasons, it must be conceded, I think, that the defendant should not be sentenced if it is true. Indictment No. 19 charges in substance that the defendant at the time named wilfully devised a fraudulent scheme to obtain money from divers persons unknown to the grand jury, to wit, sums of $50 from each of said persons, and to cheat and defraud them thereof by representing that the Provident Bond & Investment Co. (of which he was president) would on the receipt of $10, and a further sum of $5 monthly for a time specified, from said persons issue to each of them a bond in the terms set forth; that it was not intended to pay the said persons the money mentioned in said bonds and so promised to be paid, but that the defendant intended fraudulently to apply the money so received to his own use and not towards the discharge of the said bonds as therein stated; that it was intended to employ the United States mails to carry out this scheme by placing letters therein and opening correspondence with such persons, and that the mails were so used and correspondence opened.

No. 20 in substance charges that the defendant devised a
23 fraudulent scheme to obtain money by false pretences, in the manner and by the means described, which consisted substantially in representing to divers persons unknown, and particularly to one W. S. Burke, that the Provident Bond & Investment Co. would pay, in the manner and at the times stated, large sums of money on the receipt of smaller ones, to wit, $100 on the receipt of $60, and $1,000 on the receipt of $500; that it was not intended to make such payments or that they should be made, but that the defendant fraudulently designed to convert the money so to be received from such persons to his own use and not to make payment to them as represented and promised; that the said defendant intended to use and did use the United States mails to carry said fraudulent scheme into effect by opening correspondence, &c.

Each of these indictments, in my judgment, charges an offence under the statute. The acts described seem plainly to be embraced by its terms. The indictments are possibly not drawn with as much care and skill as might have been employed. The only question here presented, however, is, Do they charge offences? In my judgment, they do. The argument to the contrary is, I think, fully met by United States *vs.* Fleming, before cited. Indeed, that case seems to meet every material question raised by this. What is there said respecting the refined criticism urged against the indictment under consideration applies with equal force here. Time was when such criticism was effective, but it has passed. Indeed, it was never effective in the Federal courts. They have always held that it is sufficient to charge an offence with such particularity as will protect the

accused against danger of a second conviction and enable
24 him to prepare for trial. Here, as we have seen, an offence is charged, and it cannot be pretended that the defendant is in danger of a second conviction. The Government has seen fit to include all use made of the mails in furtherance of the scheme in these bills. The language clearly precludes any further charge on that account. If such inclusion was erroneous or the bill was so wanting in particularity as to embarrass the defendant's preparation for trial, he should, as before stated, have taken advantage of these defects at an earlier stage of the case. While the defendant's construction of the statute is ingenious, it seems to me to be clearly erroneous. It ignores the obvious signification of the terms used. It is so fully and satisfactorily met by the opinion of the court in United States *vs.* Fleming that I could not profitably add anything to what is there said. The facts of that case were similar to those before me. The judge (Blodgett) who decided it below is greatly distinguished for learning and ability, and his decision, as before remarked, was affirmed on review. If it is in conflict with *In re* Henry, 123 U. S., 372, in one respect, as the defendant urges, it is not as relates to the matter here under consideration. See also U. S. *vs.* Watson, 35 Fed. Rep., 359; U. S. *vs.* Nortan, 29 Fed. Rep., 782; U. S. *vs.* Jones, 10 Fed. Rep., 469; U. S. *vs.* Sticker, 15 Fed. Rep., 798; U. S. *vs.* Haeflinger, 33 Fed. Rep., 469; U. S. *vs.* Haines, 29 Fed. Rep., 691; *In re* Jackson, 96 U. S., 727.

I am not able to see any materiality in the fact that the Provident Bond & Investment Co. had a charter, and that the defendant was its president. As he testifies, he "invented the scheme," obtained the charter, and formed the company. If the scheme was a fraud, as charged and found by the jury, how could the charter authorize the use of the mails for its promotion against the prohibition of the statute? As well
25 might it be urged that a charter authorizes the use of the mails to promote a lottery. Indeed, it was so urged *In re* Jackson, above cited, but the charter was held to be unimportant. The charter here relied upon is not, however, a charter of this scheme. It is couched in vague, general terms and appears to have little, if any, relation to the business transacted by the company. Under similar charters issued by New Jersey, West Virginia, and some other States most of the dishonest financial schemes designed to cheat ignorant and credulous men and women are carried on. The charters are obtained for a double purpose—first, to secure or in the hope of securing personal immunity to the dishonest schemers, and, secondly, to secure a greater degree of confidence in their schemes. The circuit court of this district has very recently had occasion to pass upon the character of business transacted under one of these charters issued by West Virginia to the Mutual Bond & Investment Co. and found it to be a gross fraud upon the public. McLaughlin *et al. vs.* The Mutual Bond & Investment Co., No. 16, April sess., 1894. The charter there was as vague and general in its terms as the one before me and had about as little relation to the business transacted under it.

Whereupon a new trial is refused and the motion in arrest of judgment is dismissed.

26 And thereupon, on the said fifteenth day of January, A. D. 1895, all and singular the premises being seen and by the court here fully understood, it is considered and adjudged that the defendant, John H. Durland, pay to the United States a fine of fifty dollars; that he be imprisoned and confined in the Philadelphia county prison for the term of five calendar months, said term to commence at and from the expiration of such imprisonment as he shall or may undergo by reason of the sentence of the court this day imposed upon him under indictment No. 19, November sessions, 1894; that he pay the costs of prosecution and stand committed until judgment be fully complied with, and that he be subject in all respects to the same discipline and treatment as convicts sentenced by the courts of the Commonwealth of Pennsylvania.

And afterwards a petition that a writ of error may be allowed and citation may issue, directed to the district court of the United States for the eastern district of Pennsylvania, from the Su-

27 preme Court of the United States, with assignment of errors, bond for the prosecution of said writ, and order allowing said writ of error and citation and granting stay of execution, &c., having been filed, are in the words and figures following, to wit:

In the Supreme Court of the United States.

To the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States:

The petition of John H. Durland respectfully represents—

That he was indicted in the United States district court for the eastern district of Pennsylvania upon a bill of indictment entitled as of November sessions, 1894, No. 20.

That on the 28th day of November, A. D. 1894, he filed a motion to quash the indictment, assigning as reasons the following grounds:

1. Because the said John H. Durland was bound over simply to answer the charge of depositing a letter and circular in the post office of the United States in relation to an enterprise similar to a lottery, whereas the said bill of indictment consists solely of

28 charges which are separate and distinct from the said offence for which he, the said John H. Durland, was bound over.

2. Because the said indictment, as to the first count, fails to set out a description of the said alleged letter or contents thereof alleged to have been addressed to said W. S. Burk.

3. Because as to the second count of said indictment it fails to set out specifically and particularly the alleged twenty letters and packets alleged to have been deposited in the post office at Philadelphia or the alleged name or names of the person or persons to whom the same are alleged to have been addressed.

4. Because the said bill of indictment is otherwise informal, bad,

and defective; all of which matters and things said defendant is ready to verify.

Wherefore, for want of a sufficient indictment in this behalf, the defendant further moves the court for his discharge by the court from the said premises.

And this motion being overruled, he was duly arraigned and pleaded "Not guilty," and on the seventh day of December, A. D. 1894, he was, after a trial by jury, convicted upon both of the counts contained in said bill of indictment.

A motion in arrest of judgment and for a new trial, with an assignment of special reasons, was filed, and, being overruled,
29 he was on the 15th day of January, A. D. 1895, sentenced under said bill to a term of imprisonment in the county prison of the city and county of Philadelphia for a space of five months.

He respectfully represents that in overruling the motion to quash the indictments and the motion in arrest of judgment error was committed by the trial court, and that he has been prejudiced and greatly damaged thereby, and that it is his desire to prosecute a writ of error, to be addressed to the said district court for the eastern district of Pennsylvania, in accordance with section 5 of the act of Congress entitled "An act to establish circuit court- of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891.

He further represents that he has filed of record with the clerk of the court below a separate assignment of errors prior to the presentation of this petition, in accordance with the rules of the Supreme Court of the United States.

Wherefore he prays that a writ of error may be allowed in the premises, directed to the district court of the United States for the eastern district of Pennsylvania, and that a citation may be issued, returnable within thirty days, upon the entry of security in
30 whatever sum may be directed; that a supersedeas may be granted and stay of execution of proceedings in the court below pending such writ of error or appeal, and that your petitioner be admitted to bail upon giving bond in such sum as the district judge for the eastern district of Pennsylvania may direct.

And he will ever pray, &c.

JOHN H. DURLAND,
By HARRITY & BECK,
HAMPTON L. CARSON,
Counsel.

31 UNITED STATES OF AMERICA, *ss:*

District Court of the United States for the Eastern District of Pennsylvania, November Sessions, 1894.

UNITED STATES OF AMERICA
vs.
JOHN H. DURLAND. } No. 20.

Assignment of Errors.

The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground of the court's refusal to grant the motion to quash the indictment, said motion to quash being based upon the following grounds:

(1.) Because the said John H. Durland was bound over simply to answer the charge of depositing a letter and circular in the post office of the United States in relation to an enterprise similar to a lottery, whereas the said bill of indictment consists solely of
32 charges which are separate and distinct from the said offence for which he, the said John H. Durland, was bound over.

2. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground of the refusal of the court to quash the indictment *upon* the following reason: Because the said indictment, as to the first count, fails to set out a description of the said alleged letter, or contents thereof, alleged to have been addressed to said W. S. Burk.

3. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground of the refusal of the court to quash the indictment, which motion to quash was based upon the ground that the second count of said indictment failed to set out specifically and particularly the alleged twenty letters and packets alleged to have been deposited in the post office at Philadelphia or the alleged name or names of the person or persons to whom the same were alleged to have been addressed.

4. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that the court erred in refusing to quash the indictment, said motion being based upon the ground that the bill of indictment was other-
33 wise informal, bad, and defective.

5. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that the said bill of indictment did not charge any offence under section 5480 of the Revised Statutes or any other law of the United States.

6. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that the said bill of indictment did not set forth any scheme or artifice to defraud within the meaning of the act of Congress.

7. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that the bill of indictment charged more than one separate and distinct offence in the first and second counts in the bill of indictment.

8. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that the bill of indictment charged more than three offences, contrary to the act of Congress.

9. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that it is not alleged that the various offences charged in the said bill of indictment were committed within the same six calendar months.

34 10. The court erred in imposing sentence of five months, for the reason that there is nothing to show upon the face of the said bill of indictment that the letters deposited and lodged in the mails were not the same letters in indictment No. 20, and the defendant has therefore been twice sentenced for the same offence.

HARRITY & BECK.
HAMPTON L. CARSON.

35 Know all men by these presents that we, John H. Durland, as principal, and The City Trust, Safe Deposit and Surety Company of Philadelphia, as sureties, are held and firmly bound unto the United States of America in the full and just sum of two hundred and fifty dollars ($250), to be paid to the said United States of America, their certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-third day of January, in the year of our Lord one thousand eight hundred and ninety-five (1895).

Whereas lately, at a session of a criminal court held at Philadelphia, in the eastern district of Pennsylvania, in the month of December, A. D. 1894, in a suit depending in said court between The United States of America, plaintiff, and John H. Durland, yeoman, defendant, in said district, upon a certain bill of indictment No. 20, of November sessions, 1894, upon which, after sundry other proceedings, issue was joined and a trial had before the Hon. William Butler, a United States district judge, and by the jury in said case a verdict was rendered against the said John H. Durland on December 7, 1894, of guilty, and he was sentenced to a term of five months' imprisonment in the county prison of Philadelphia, to commence at expiration of a preceding term of five months, and the said John H. Durland, *conceding* that manifest errors have happened, to his great prejudice, having presented his petition for a writ of error to the Hon. George Shiras, Jr., of the United States Supreme Court, and having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the verdict in the aforesaid suit, and a citation directed to the said clerk of the United States district court for the eastern district of Pennsylvania, citing and admonishing him to return the record, so that it be *be* and appear at a Supreme Court of the United States *circuit court of appeals for the third circuit, to be holden at the city of Philadelphia*, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said

John H. Durland shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN H. DURLAND. [SEAL.]
THE CITY TRUST, SAFE DEPOSIT AND SURETY CO. OF PHILA.,
By CHARLES M. SWAIN, *President.*
JAS. F. LYND, *Sec't'y.* [SEAL.]

Sealed and delivered in presence of—
THOMAS M. CARLIN.

WM. G. WISE,
J. WESLEY CONN,
As to surety.

Approved by—
GEORGE SHIRAS, JR.,
Associate Justice Sup. Court U. S.

Jan'y 24, 1895.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

I hereby certify that "The City Trust, Safe Deposit and Surety Company of Philadelphia," the surety within named, is good and sufficient for the full amount of the penalty of the bond.

CHARLES S. LINCOLN,
Clerk of the District Court of the United States for the Eastern District of Pennsylvania.

36 *Order.*

And now, to wit, the 24th day of January, A. D. 1895, the petition of John H. Durland, praying for a writ of error to the district court of the United States for the eastern district of Pennsylvania, having been read and considered and the rules of this court having been complied with as to the filing with the court below assignments of error, it is ordered that a writ of error be allowed, and that a citation do issue, addressed as prayed for, returnable within thirty days hereafter, upon the entry of security in the sum of two hundred and fifty dollars; that a supersedeas be granted and a stay of proceedings and execution of sentence imposed by the court below pending this writ of error, and that John H. Durland, petitioner, be admitted to bail upon giving bond in such sum as the district judge for the eastern district of Pennsylvania shall direct.

GEORGE SHIRAS, JR.,
Associate Justice Supreme Court U. S.

37 And thereupon an order for the release of the said defendant, John H. Durland, pending the final determination of the proceedings on said writ of error, is entered in the words and figures following, to wit:

E. D. of Pa., Nov. S. of 1894.

THE UNITED STATES } No. 20.
vs.
JOHN H. DURLAND. }

And now, to wit, January 25, A. D. 1895, a writ of error having been allowed in the above case from the judgment of the district court, and it having been ordered that the defendant be released on bail pending the final determination of the proceedings on said writ of error, and a bond and surety in two thousand dollars ($2,000) having been approved by this court, it is ordered that upon the execution of the said bond by the said John H. Durland, defendant, he be forthwith released from imprisonment and discharged from the custody of the superintendent of the Philadelphia county prison.

And afterwards, on the same day, it appearing that the defendant had executed the said bond, he is discharged from the custody of the superintendent of the Philadelphia county prison.

38 UNITED STATES, } *ss*:
Eastern District of Pennsylvania, }

We, John H. Durland, residing lately at Moore's Station, Delaware county, in the State of Pennsylvania, and now residing at No. 42 West 97th street, New York city, in the State of New York, and Robert Anderson, residing at No. 418 North 40th street, in the city of Philadelphia and State of Pennsylvania, acknowledge ourselves to be jointly and severally indebted unto the United States of America in the sum of two thousand dollars, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenements, upon this condition: that if the said John H. Durland, the defendant, upon whose application a writ of error has been allowed by the Supreme Court of the United States and is now pending, shall be and appear at the district court of the United States for the eastern district of Pennsylvania, upon the determination of the proceedings on said writ of error or within five days thereafter, to answer and obey whatever final order or judgment shall be made in the premises, then this recognizance to be void; otherwise to remain in full force and virtue.

JOHN H. DURLAND. [L. S.]
ROBERT ANDERSON. [L. S.]

Taken, acknowledged, and subscribed this twenty-fifth day of January, A. D. 1895, in open court.

CHARLES S. LINCOLN,
Clerk District Court.

39 UNITED STATES OF AMERICA, } *sct*:
Eastern District of Pennsylvania, }

I, Charles S. Lincoln, clerk of the district court of the United States for the eastern district of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of the

record and proceedings in *his* said court in a certain criminal cause therein lately depending, to wit, indictment, No. 20, November sessions, 1894, The United States of America against John *F.* Durland, defendant, as full and entire as the same are now remaining among the records of the said court in my office, with copy of petition for writ of error, of the assignment of errors, and of the bond on writ of error.

Seal of the District Court of the United States, E. D. Penna.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said district court, at Philadelphia, this seventh day of February, in the year of our Lord one thousand eight hundred and ninety-five, and in the one hundred and nineteenth year of the Independence of the United States.

CHARLES S. LINCOLN,
Clerk Dist. Court U. States.

40 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the eastern district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between The United States, plaintiff, and John H. Durland, defendant, No. 20, November sessions, 1894, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of January, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 20, Nov'r sess., 1894, of indictments. District court U. States, eastern district of Penna. The United States *vs.* John H. Durland. Writ of error from the Supreme Court of the United States. Lodged in the clerk's office of the district court of the United States *the* Jan'y 25th, 1895.

41 UNITED STATES OF AMERICA, *ss:*

To The United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the eastern district of Pennsylvania, wherein John H. Durland is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 24th day of January, in the year of our Lord one thousand eight hundred and ninety-five.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 20, Nov'r sess., 1894, of indictments. District court U. States, eastern district of Penna. The United States *vs.* John H. Durland. Citation on writ of error and acceptance of service by the attorney of the United States. Lodged in the clerk's office of the district court of the United States this January 25th, 1895. Service accepted Jan'y 25, 1895. Ellery P. Ingham, U. S. att'y.

Endorsed on cover: Case No. 15,796. E. Pennsylvania D. C. U. S. Term No., 912. John H. Durland, plaintiff in error, *vs.* The United States. Filed February 15th, 1895.

[Endorsed:] No. 20, Nov'r sess. 1894, of indictments. District court U. States, eastern district of Penna. The United States *vs.* John H. Durland. Writ of error from the Supreme Court of the United States. Lodged in the clerk's office of the district court of the United States *the* Jan'y 25th, 1895.

41 UNITED STATES OF AMERICA, *ss.*

To The United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the eastern district of Pennsylvania, wherein John H. Durland is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 24th day of January, in the year of our Lord one thousand eight hundred and ninety five.

GEORGE SHIRAS, JR.,

Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 20, Nov'r sess., 1894, of indictments. District court U. States, eastern district of Penna. The United States *vs.* John H. Durland. Citation on writ of error and acceptance of service by the attorney of the United States. Lodged in the clerk's office of the district court of the United States this January 25th, 1895. Service accepted Jan'y 25, 1895. Ellery P. Ingham, U. S. att'y.

Endorsed on cover: Case No. 15,796. E. Pennsylvania D. C. U. S. Term No. 942. John H. Durland, plaintiff in error, *vs.* The United States. Filed February 15th, 1895.

528 & 529

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FILED.
OCT 15 1895
JAMES H. McKENNEY,
CLERK.

Nos. 911, 912. October Term, 1895.

Supreme Court of the United States.

John H. Durland, Plaintiff in Error,

vs.

The United States.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE PLAINTIFF IN ERROR.

JAMES M. BECK,
WILLIAM F. HARRITY,
HAMPTON L. CARSON,
Counsel for Plaintiff in Error.

Allen, Lane & Scott, Prs., Phila.

In the Supreme Court of the United States.

John H. Durland, Plaintiff in Error,
vs.
The United States.

October Term, 1894.
Nos. 911 and 912.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

STATEMENT OF THE CASE.

(Cases Nos. 911 and 912.)

The facts in both cases are practically the same; they were not separately treated in the court below, but were tried together.

The plaintiff in error was indicted on the nineteenth day of November, 1894, for having knowingly, willfully, and falsely devised a scheme and artifice to defraud, and for having used the mails in execution of said scheme, under section 5480 of the Revised Statutes of the United States, as amended by the Act of March 2d, 1889, which is as follows:—

"*Section 5480.—If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or*

intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'sawdust swindle,' or 'counterfeit money fraud,' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'bills,' 'paper goods,' 'spurious Treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside of the United States, by means of the Post Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement, in any post office, branch post office, or street or hotel letter box of the United States, to be sent or delivered by the said post office establishment, or shall take or receive any such therefrom, such person so misusing the post office shall, upon conviction, be punishable by a fine of not more than $500, and by imprisonment for not more than eighteen months, or by both such punishments, to be at the discretion of the court.

"The indictment, information, or complaint may severally charge offenses to the number of three, when committed within the same six calendar months; but the court shall thereupon give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post office establishment enters as an instrument into such fradulent scheme or device."

In case No. 911, the plaintiff in error was charged in the First count of the indictment, with devising a scheme and artifice to defraud, for the purpose of obtaining for himself from divers persons sums of money, by representing that The Provident Bond and Investment Company would, upon the payment of a certain sum of money, issue to each of the persons making payment, a bond in the words and matter set forth in

the photolithograph attached to page 2 of the Transcript of Record; *and by representing that the bonds would mature in accordance with the terms thereof, and that the redemption value of the bond, and the sum of money payable therefor, would be the sum specified in a certain circular issued by the said Provident Bond and Investment Company*, the words of which appear upon page 2 of the Transcript of Record; whereas, in truth and in fact, he, *the said John H. Durland, being then and there the president of the said Provident Bond and Investment Company, did not intend that the said bonds would mature in accordance with the terms there stated, and that the redemption value of the bond, when called, and the sum payable therefor, would be the sum specified*, and at the time named in the circular issued by the said company, as he, the said John H. Durland, then and there well knew. And the said Durland intended then and there, by said false representations, to obtain for his own use the sum of money paid by each of the said persons; which scheme and artifice to defraud was to be effected by opening a correspondence through the post office, and by inciting other persons to open communication with him, and that in the execution of said scheme he caused to be placed in the post office of the United States *divers letters and packages, to wit, twenty letters and circulars* directed respectively to the said divers persons, the names and addresses of whom are to this grand inquest unknown.

The Second count in the indictment charged substantially the same offense, except that the form and matter of the bond appears in the photolithograph attached to page 6 of the transcript of record.

In case No. 912, the same plaintiff in error was charged with knowingly, willfully, and falsely devising a scheme and artifice to defraud, by means of false pretenses and subtle means and devices, to obtain and acquire for himself and from another person, to wit, W. H. Burke, a large sum of money *by representing that the Provident Bond and Investment Company would pay to the said Burke a large sum of money if he, the said Burke, would within ten months pay to the said company a sum less than the amount promised, whereas, in truth and*

in fact, the said John H. Durland did not intend that the said Provident Bond and Investment Company would pay to the said Burke a large sum of money if he would pay to the Provident Bond and Investment Company a less sum of money, as he, the said John H. Durland, then and there well knew; but he, the said John H. Durland, intended then and there by said false representations to obtain for his own use the sum of sixty dollars from the said Burke, and to cheat and defraud Burke thereof; which scheme and artifice was to be effected by opening a correspondence with the said Burke through the post office, and by inciting the said Burke to open communication with him, the said Durland, and that in the execution of said scheme and artifice to defraud *he caused to be placed a letter in the post office at Philadelphia, addressed "W. S. Burke, Chester, Pa.,"* of which profert was made.

The Second count of said indictment charged substantially the same offense, except that it charged him with endeavoring to acquire from divers persons, to the grand inquest unknown, a large sum of money, to wit, the sum of $500 each, and to cheat and defraud the said divers other persons *by then* and there *representing*, among other things, that the Provident Bond and Investment Company *would pay* to each of the said divers other persons the sum of $1000 if each of the said persons would pay to the said company a sum of money less than the sum of $1000; *whereas, in truth and in fact, he did not intend* that if the said persons should pay to the Provident Bond and Investment Company a sum of money the said company would pay to each of said divers persons a large sum of money, as he then and there well knew, but that he intended then and there, by said false representations, to obtain for his own use the said sum of $500 from each of the said divers persons and to cheat and defraud them; which scheme and artifice to defraud was to be effected by opening a correspondence and communicating with the said divers persons by means of the post office, and by inciting such divers other persons to open communications with him, and in pursuance and execution of said scheme and artifice to defraud he did cause to be placed in the post office of the

United States at Philadelphia *divers letters and packets, to wit, twenty letters and packets* directed respectively to the said divers persons, the names and addresses of whom were to the grand inquest unknown.

In each case a motion to quash was made for the reasons set forth upon page 7 of Transcript of Record in case 911, and page 4 of the Transcript of Record of case 912. The motions were overruled and the defendant was arraigned and tried upon pleas of not guilty. A trial was had, resulting in conviction. Motions for a new trial were overruled, and a motion in each case was then made in arrest of judgment upon the grounds specially stated on page 9 of Transcript of Record No. 911, and on page 6 of Transcript of Record No. 912.

The motions were overruled and judgment was entered, the trial judge filing a written opinion, which is the same in each case, and which appears upon pages 7, 8, 9, 10, and 12 of Transcript No. 911, and on pages 10, 11, 12, and 13 of Transcript No. 912.

The sentence in the first case was that the defendant pay "a fine of fifty dollars; that he be imprisoned and confined in the Philadelphia County prison for the term of five calendar months, said term to be computed from the seventh day of December, 1894, the day upon which the defendant was convicted of the offense charged; that he pay the costs of prosecution, and stand committed until judgment be fully complied with, and that he be subject in all respects to the same discipline and treatment as convicts sentenced by the courts of Pennsylvania."

The sentence in case No. 912 was in precisely similar terms, except that it was to commence at and from the expiration of such imprisonment as he shall or may undergo by reason of the sentence of the court in the former case.

The petition for the writ of error in each case was duly presented and allowed. The writs of error were then duly

issued, and the records brought to this tribunal for consideration.

The questions involved are those of the sufficiency, in point of law, of the various counts in the indictment upon which the defendant was sentenced. The manner in which they are raised is by motion in arrest of judgment, based upon grounds previously urged in support of said motions in the court below.

ASSIGNMENT OF ERRORS IN RECORD CASE No. 911.

1. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground of the court's refusal to grant the motion to quash the indictment, said motion to quash being based upon the following grounds:—

Because the said John H. Durland was bound over simply to answer the charge of depositing a letter and circular in the post office of the United States in relation to an enterprise similar to a lottery, whereas the said bill of indictment consists solely of charges which are separate and distinct from the said offense for which he, the said John H. Durland, was bound over.

2. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground of the court's refusal to grant the motion to quash the indictment, said motion to quash being based upon the following grounds:—

Because the said bill of indictment fails to set out specifically and particularly the contents and descriptions of the said alleged twenty letters and packets alleged to have been deposited in the post office at Philadelphia, as alleged in the first and second counts of said indictment.

3. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground of the court's refusal to grant the motion to quash the indictment, said motion to quash being based upon the following grounds:—

3. Because the said bill of indictment fails to state the

names and addresses to whom the alleged twenty letters and packets were alleged to have been addressed.

4. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that the court erred in refusing to quash the indictment, said motion being based upon the ground that the bill of indictment was otherwise informal, bad, and defective.

5. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that the said bill of indictment did not charge any offense under section 5480 of the Revised Statutes or any other law of the United States.

6. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that the said bill of indictment did not set forth any scheme or artifice to defraud within the meaning of the Act of Congress.

7. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that the bill of indictment charged more than one separate and distinct offense in the first and second counts in the bill of indictment.

8. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that the bill of indictment charged more than three offenses, contrary to the Act of Congress.

9. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that it is not alleged that the various offenses charged in the said bill of indictment were committed within the same six calendar months.

10. The court erred in imposing a sentence of five months, for the reason that there is nothing to show upon the face of said bill of indictment that the letters deposited and lodged in the mails were not the same letters in indictment No. 20, and the defendant has therefore been twice sentenced for the same offense.

ASSIGNMENT OF ERRORS IN RECORD CASE No. 912.

1. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground of the court's refusal to grant the motion to quash the indictment, said motion to quash being based upon the following grounds:—

2. Because the said John H. Durland was bound over simply to answer the charge of depositing a letter and circular in the post office of the United States in relation to an enterprise similar to a lottery, whereas the said bill of indictment consists solely of charges which are separate and distinct from the said offense for which he, the said John H. Durland, was bound over.

3. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground of the refusal of the court to quash the indictment upon the following reason: because the said indictment as to the first count fails to set out a description of the said alleged letter or contents thereof alleged to have been addressed to said W. S. Burke.

4. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground of the refusal of the court to quash the indictment, which motion to quash was based upon the ground that the second count of said indictment failed to set out specifically and particularly the alleged twenty letters and packets alleged to have been deposited in the post office at Philadelphia, or the alleged name or names of the person or persons to whom the same were alleged to have been addressed.

5. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that the court erred in refusing to quash the indictment, said motion being based upon the ground that the bill of indictment was otherwise informal, bad, and defective.

6. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground

that the said bill of indictment did not charge any offense under section 5480 of the Revised Statutes or any other law of the United States.

7. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that the said bill of indictment did not set forth any scheme or artifice to defraud within the meaning of the Act of Congress.

8. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that the bill of indictment charged more than one separate and distinct offense in the first and second counts in the bill of indictment.

9. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that the bill of indictment charged more than three offenses, contrary to the Act of Congress.

10. The court erred in refusing to arrest the judgment, said motion in arrest of judgment being based upon the ground that it is not alleged that the various offenses charged in the said bill of indictment were committed within the same six calendar months.

11. The court erred in imposing sentence of five months, for the reason that there is nothing to show upon the face of the said bill of indictment that the letters deposited and lodged in the mails were not the same letters in indictment No. 19, and the defendant has therefore been twice sentenced for the same offense.

BRIEF OF ARGUMENT.

John H. Durland was convicted under two bills of indictment, found under section 5480 of the Revised Statutes of the United States, as amended by the Act of March 2d, 1889, charging him with the illegal use of the mails in the execution of a scheme or artifice to defraud.

We contend that the learned court below erred in refusing to quash the indictments, and in refusing to arrest judgment

in each case, because, as we submit, those indictments do not charge an offense under any law of the United States.

To consider properly the question under discussion it is first necessary to correctly understand the meaning of the Act of Congress, and to gain this we must consider the legislative history of this law. It owed its origin to the Act of June 8th, 1872. The mischief sought to be remedied was the use of the mails by gangs of swindlers, who, having no known place of business, and conducting their operations under assumed and fictitious names, sent through the mail letters and circulars in regard to lotteries, gift enterprises, &c. The business sought to be enjoined was such as was intrinsically immoral, and the United States very properly, in support of the effort of the State authorities to correct these abuses, made illegal the misuse of the mails in connection with this class of business. It is quite obvious, however, that Congress had no desire to embrace within the criminal jurisdiction of the Government any and every business in which the mails might be used incidentally. In the first edition of the Revised Statutes, section 3894, the offense was described as follows:—

"No letter or circular concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail," &c. Two things are to be noted with respect to this section. In the first place, that it is letters concerning "lotteries, gift concerts, or other *similar* enterprises" which were forbidden; the word "similar," therefore, describes the class of evils as in the nature of lotteries. In the second place, the words "offering prizes" or "concerning schemes" further described the class of transactions referred to, and lastly, the purpose sought to be prevented was the obtaining "money under false pretenses." This was an existing common-law offense, and Congress, when it used these words of the common law, evidently determined that it was the use of the mails in connection with that common-law crime

that the Federal Government would punish. It is not to be supposed that Congress meant to create a crime of every transaction that had in it either a moral taint or an ethical doubt. Men's minds and consciences would differ very widely as to what constituted fraud. If Congress intended to make criminal the moral abstract idea of fraud it would have acted as unjustly and unwisely as did that Roman emperor who wrote his decrees for the public information, but who placed them upon a pillar so high above the ground that no one could read them. In a matter involving liberty and reputation the law must be specific and clear as to what is commanded and what prohibited; common law, common sense, and common justice alike demand this. It is impossible, therefore, to believe that Congress made criminal the abstract idea of fraud. *It meant fraud in its strictly legal signification, namely, the common-law offense of obtaining money by false pretenses.* In text books this is commonly called cheating or defrauding, so that the word has an accepted legal signification.

In the second edition of the Revised Statutes the same language is used: "Any scheme or artifice to defraud;" but the codifiers evidently supposed that the legal signification of the word to defraud was so well established that the additional words "for the purpose of obtaining money under false pretenses" were unnecessary. There is no reason to believe that Congress meant to enlarge the character of the crime or to alter its substantial nature. This section was repealed by the Act of March 2d, 1889, and the obvious meaning of Congress more clearly stated. This Act begins with the same words as Revised Statutes 5480, and then proceeds to enumerate a number of illegal transactions, such as the "sale of counterfeit money," "green goods," "the sawdust swindle," which the Act seeks to prevent. A definition of what is meant is given by a series of specific illustrations. Section 2 prohibits the use of any fictitious, false, or assumed name. Section 3 empowers the Postmaster-General or any postmaster to "notify the party to appear at the post office and be identified." Section 5 provides that "whenever the Postmaster-General is

satisfied that the address is not the residence or business address of the person, letters can be withheld until identification," &c. Reading this new Act from its four corners it is obvious that the Act intended to deal with a class of offenses with which the courts have had considerable experience. It referred to swindlers who, without any real business place and under fictitious names, and upon false and fraudulent pretenses obtained money from people at a distance by opening correspondence with them through the mails, or inciting them to do so. We do not contend that the business must necessarily refer to a lottery or counterfeit money, but that it must be a business that was fraudulent *per se*, and whose methods would subject the defendant to conviction under the common-law offense of "obtaining money under false pretenses." Every case that has been reported is of this character. In each there was either an illegal business or such fraudulent misrepresentation of existing facts as would render the defendant liable under the State statutes. To consider, therefore, whether the defendant was properly convicted under this Act of Congress, and whether the indictment in itself supported the conviction, we must have recourse to the interpretation of the common-law offense of obtaining money under false pretenses, for it has been repeatedly ruled that when the United States creates an offense, which was before an offense at common law, the common law may be looked to to ascertain the meaning.

Leaving aside then the facts as developed upon the trial, and confining our attention to the indictment alone, we find that it is defective for three reasons :—

First.—That upon its face it not only does not charge the offense prohibited by the Act but affirmatively absolves the defendant from such offense. The indictment begins by charging that one John H. Durland did knowingly, willfully, and falsely devise a scheme and artifice to defraud. This is simply the language of the statute, and this is not sufficient. The Supreme Court has distinctly ruled that while the words of the statute can be used, yet the facts which constitute the offense must be so clearly specified as to enable the judge to

etermine on the face of the indictment whether the facts, f true, constitute the offense; and further, to intelligently inform the defendant what he is to meet. In the case of the *United States* vs. *Hess*, 124 U. S., 483, an indictment framed under this Act was quashed for such want of particularity. Said Mr. Justice Field: "No essential element of the crime an be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, nd the charge must be made directly and not inferenally, or by way of recital. * * * *Such particulars are matters of substance, and not of form, and their omission is not aided or cured by the verdict.*"

In this indictment the pleader unquestionably proceeds o specify the nature of the crime to defraud, but unfortunately for him he deliberately pleads his case out of court. He states that the "false pretense" was to obtain a sum of money "by then and there representing among other hings that the Provident Bond and Investment Company *would* upon the payment of a certain sum of money issue to each of the said divers persons a bond, in the words and matter following, to wit: (here follows the bond. See photolithograph attached to page 2 of Transcript of Record, case 911.) And that the said bonds *would* mature in accordance with its paragraphs, &c., and that the redemption value of said bonds when called and the sum of money payable therefor, &c., would be the sums specified and at the time named, and upon the payment of the sums of money named in the circular (here followed the circular). *Whereas in truth and in fact the said John H. Durland* DID NOT INTEND *that the said bonds would mature, &c., and that the redemption value of the bond when called, and the sum payable, &c., would be the sum specified.*"

We have here then an absolute failure to describe a false pretense, which according to any decision of any court has ever been held to be either a civil or a criminal fraud. *There is no averment that the bonds were not issued or that they were not in fact paid on maturity.* No such averment could have been made, because admittedly the bonds were issued and had

not matured at the time of the trial. But even if the pleader had been able to aver that the bonds had not been issued and that the sums had not been paid it would not have helped the defective pleading, because *it discloses on its face absolutely nothing but an intention to commit a violation of a contract. If there be one principle of criminal law that is absolutely settled by an overwhelming avalanche of authority it is that fraud either in the civil courts or in the criminal courts must be the misrepresentation of an existing or a past fact, and cannot consist of the mere intention not to carry out a contract in the future.* See authorities collated in Vol. VIII., American and English Encyclopædia of Law, page 636, note (1) Title Fraud.

There is absolutely no suggestion in the indictment that the company had not carried out its contract or that Dr. Durland had not carried out his contract. If the company was exceeding its charter rights a *quo warranto* was appropriate to determine this question. If its contracts were not carried out the company was responsible and could be sued in the civil courts. If wrong were done, not merely the directors, but every one who subscribed was *in pari delicto*. Because twelve jurymen did not believe the scheme feasible, to convict the president of the company of a crime seems to us an unwarranted extension of the criminal jurisdiction of the Government. We cannot think that Congress ever intended that twelve jurymen should pass upon the practicability of business schemes. If this were permitted, no man's liberty or reputation, who was original enough to devise something new, would be safe. Certainly Congress did not intend to make the failure to keep a contract a criminal offense, or to permit conviction on evidence of an intention not to fulfill a contract, where such intention is unaccompanied by false statements. The law upon this case, as we said, is without a dissenting note. An illustration is *Sawyer* vs. *Prickett*, 19 Wallace, 146, which in some respects resembles this case. A farmer was induced to mortgage his property on the faith of statements and promises that a railroad would be built and that it would be operated at a large profit, and would confer various benefits on the community in general and Sawyer in

particular. Sawyer mortgaged his farm, and on the faith of these promises subscribed for the stock. The road was never built. *Held*, that this did not constitute fraud sufficient to even invalidate the mortgage, much less be the subject of a criminal action. Said Mr. Justice Hunt:—

"The law gives a different effect to a representation of existing facts from that given to a representation of facts to come into existence. To make a false representation the subject of an indictment or of an action, two things are generally necessary, viz., that it should be a statement likely to impose upon one exercising common prudence and caution, and that it should be the statement of an existing fact. A promissory statement is not ordinarily the subject either of an indictment or of an action. The law also gives a different effect to those promissory statements based upon general knowledge, information, and judgment, and those representations which, from knowledge peculiarly his own, a party may certainly know will prove to be true or false."

In this case all that the indictment averred was an alleged intention of the defendant not to carry out the contracts of his company. The statements in the literature of the company and the bonds of the company were at best but promissory statements, which were either expressions of opinion as to value of agreements to pay in future; they did not, therefore, constitute fraud, either civil or criminal, and did not support this conviction.

However the indictments under discussion may be read, they disclose absolutely nothing but the fact that when the defendant made the alleged promises he did not intend to carry them out. And however reprehensible this may be in morals the law has never permitted it to be the subject of a criminal offense. We contend with confidence that the charge is pleaded out of court by the affirmative declaration that the only false pretense of the defendant was an intention not to do a thing in the future which, as a matter of fact, the indictment does not even state he did not do.

Second.—The indictment is moreover defective in that it avers that in pursuance of this fraudulent scheme twenty

letters and packets were deposited in the post office, without in any way specifying the character of these letters or packets, and this is also absolutely fatal to the indictment. It must be obvious that it is not every letter that is deposited in the mails in connection with a fraudulent scheme that comes within the ban of the statute. This is clear because it is not every letter relating to a scheme or artifice to defraud which is criminal. It must not be forgotten that the mails are for the service of the public; that the right to use them is one of the *rights* of a citizen; that it is a part of the freedom of communication, and hence there is a natural presumption in favor of his use of the mails. Liberty of correspondence is essential to freedom, quite as important as liberty of publication; indeed the latter would be of little value without the former. See language of Mr. Justice Field, in *Ex parte* Jackson, 96 U. S. Rep., 727. So, too, Judge Brown, in *Commerford* vs. *Thompson*, 1 Fed. Rep., 417, says: "But while there is, undoubtedly, power to describe what shall and what shall not be carried by post, the mails are, *prima facie*, intended for the service of every person desiring to use them; and a monopoly of this species of commerce is secured to the Post Office Department." In determining the meaning of the word "concerning" as used in section 3894 of the first edition of the Revised Statutes, the same judge says: "Whether it was intended to apply only to mail matter posted in the interest of lottery companies, gift concerts, and other similar enterprises, by their managers or agents, for the purpose of attracting custom, or equally to letters addressed to such companies, is the main question in this case. Its solution depends largely upon the construction to be put upon the word 'concerning.' It is obvious that this word was not intended to be used in its broadest sense, 'pertaining to or relative to,' as such construction would include every letter of which the enterprises mentioned in the section were wholly or in part the subject, comprising not only letters written in the interest of these enterprises, but letters of inquiry, letters seeking legal advice, letters written for the purpose of suppressing

their business, and even the correspondence carried on between the department and the general post office in this use. This certainly was not the intention of Congress."

The statute clearly says, "If any person having devised, or intending to devise any scheme or artifice to defraud * * * to be effected by either opening or attempting to open correspondence or communication with any person, * * * or by inciting such other person to open communication with the person so devising or intending, shall and for executing such scheme or artifice, or attempting so to do, place or cause to be placed," &c. The letter therefore that is illegal is a letter that seeks to *open* a correspondence with another person, or to incite him so to do. The word "open" has a clearly defined meaning; it is to begin, to commence; and the reason why Congress made criminal the attempt to open a correspondence was that the class of offenses which it designed to prohibit was where the swindler would write a letter ordering things or soliciting money, and, having received the thing sought, never reply. Congress never contemplated that the correspondence would get beyond the preliminary stages, Until this case it was never dreamed that the president of a corporation, duly chartered by a State, licensed by a State, having a known place of business, and conducting a very large business correspondence, would subject himself to the criminal law as to *any* and all of the corporation's business communications. That the construction contended for is the true interpretation of the Act is shown by the *United States* vs. *Mitchell*, 36 Federal Reporter, 492. One Mitchell held an accident policy; he received an assessment notice requiring him to pay April 19th, 1887, or his policy would lapse. He failed to pay the assessment in time. He mailed a letter April 27th, 1887, but to deceive the insurance company he changed the types from which the postmarks were printed so that the letter was apparently dated April 17th. He was indicted under this statute. Said Judge Acheson: "A careful study of the language has convinced me that it was not intended that this section should embrace every case where a letter promotive of, or connected with a fraudulent

design, may be sent through the post office by a person engaged in or contemplating the fraud. As was said in *Brand* vs. *United States*, 4 Federal Reporter, 395, the scheme to defraud within the meaning of said section is one which is to be effected by the deviser of it opening a correspondence by mail, or by inciting some one else to open such correspondence with him. To constitute the statutory offense then, something more is necessary than the mere sending through the mail of a letter forming part or designed to aid in the perpetration of a fraud."

In the *United States* vs. *Owens*, 17 Federal Reporter, 72, defendant being a debtor, mailed a letter to his creditor, pretending to enclose money, but in reality enclosing only worthless slips of paper, and asking credit for such payment; it was held not to be an offense within the statute. Said Treat, J.: "There may have been an attempt to cheat cognizable possibly by some State statutes or at common law. Were the postal laws designed to draw within Federal jurisdiction each and every individual transaction between debtor and creditor when postal correspondence ensues with a respect thereto, irrespective of the possibilities of effecting a fraud, if any were designed?" The judge then discusses the question and decides that it was not. Among other things he said: "If such is the scope of the section named, it may draw within Federal cognizance nearly all the commercial correspondence of the country as to disputed demands, and the value of remittances."

We contend that as every essential fact must be averred in the indictment, and as the depositing of a letter is the gravamen *or gist of the action, the indictment must either recite the letters or at least by direct statement show that the purpose and character of the letters were within the prohibition of Congress. The names and addresses of the parties to whom the letters were sent ought to be stated, so as to inform the defendant as to what parts of his correspondence the charge of crime is made.*

Thus in *United States* vs. *Noelke*, 1 Federal Reporter, 426, the business was a lottery. The letters were set forth in full in the indictment, but on their face were ambiguous in meaning, although to the common apprehension they

clearly referred to a lottery. Nevertheless, the indictment was held bad because of failure to directly aver the character of the letter, and to bring it within the provision of the statute. The gist of the offense is the *abuse*, not the use of the mails. The charge must be clearly made that the letter was posted with the intent to open a correspondence, or to invite another to open a correspondence, with the intent in the schemer to defraud; and that the letter was posted in execution of the scheme to defraud, which must be set forth. Nothing must be by way of recital, innuendo, or inference. The charge must be direct, positive, circumstantial.

In fact, in *U. S.* vs. *Noelke*, 1 Fed. Rep., 426, we have a case directly in point. There Judge Choate, in a most carefully considered opinion, says (page 430): "It is undoubtedly an established rule of criminal pleading that in setting out a writing as an alleged violation of a statute, where words constitute the gist of an offense, if the paper itself in its own terms does not purport to be the thing prohibited, the indictment should by further averment or innuendo set forth that essential fact."

In dealing with the second count in the indictment on a motion in arrest of judgment, Judge Choate said: "The alleged defect in the second count is that the circular should have been set forth, not as it is by description of its contents, but *in haec verba*. Where the offense consists of words spoken or written, the general rule is that those words must be set forth in the indictment. This rule has been applied in a large number of cases, including the offense of sending threatening letters. *Rex* vs. *Dogd*, 2 East's P. C., 1122. It seems to us the present case is within the general rule." He then states the exception as to obscene matter, so as not to soil the records of a court, and then says: "This objection appears to have been regarded as one of substance and not of form merely, and, therefore, is not aided by verdict at common law. *Bradlaugh* vs. *The Queen*, L. R., 32 B. D., 618. And for the same reason we think it is not covered by the statute above referred to" (Rev. Stat., section 1025). He then sustained the motion in arrest of judgment.

It is well here to remind the court that our objection was taken on the motion to quash the indictment, and was not left until after verdict. This is an objection which applies to both bills and to all counts.

In the case of *U. S.* vs. *Smith*, 45 Fed. Rep., 561, the indictment was very similar to that in the case at bar. *Held*, that the indictment was defective, because it did not charge, except inferentially, that the letter was deposited with the design of opening correspondence in execution of a scheme to defraud. Because of the similiarity of the indictments we ask especial attention to the opinion in this case of Judge Jenkins.

If we turn to the four counts of the present indictments we will find an absolute failure to describe or identify these letters in any way. They are not set forth in the indictment. With the exception of one count, neither the names nor addresses are given. In that one exception only the name and address is given, but nothing is stated to indicate the character of the inclosure. The four counts all aver "the said John H. Durland having devised, &c., and so designing, &c., did place and cause to be placed in the post office, &c., divers letters and packets, to wit, twenty letters and circulars directed respectively to the said divers persons, the names and addresses of whom are to this grand inquest unknown."

This is a most extraordinary averment. It absolutely fails to identify the letters in any way so that this court can upon the face of the indictment determine as matter of fact whether the letters were designed to open a correspondence or to execute a scheme to defraud. The omission to describe the letters is error. *Com'th* vs. *Eve*, 115 Mass., 481. Certainly Dr. Durland could have written thousands of letters that were not criminal. He was entitled to know the letters that were alleged to be criminal, and of this the United States has failed to inform him. No better test of the sufficiency of the indictment can be had than to ask how it will serve its great object, not merely of advising him of the nature of the charge, but also of protecting him from a second conviction for the same offense? It must be remembered that

the depositing of each letter of the kind mentioned in the Act is a separate and distinct offense. *How can the defendant, if arrested again on the same charge, plead his conviction on the present indictments when there is nothing in those indictments to identify the letters, and the very date of mailing is nominal rather than real?*

The record in the two cases at bar contains inherent, and, as it seems to us, conclusive evidence of the insufficiency of either of the indictments to protect the defendant from a second conviction for the same offense, and this amply justified our criticism of them.

The learned judge of the court below, in this connection, says: "It cannot be pretended that the defendant is in danger of a second conviction. The Government has seen fit to include all use made of the mails in furtherance of the scheme in these bills. The language clearly precludes any further charge on that account."

We are at a loss to know how the learned judge arrived at this conclusion. The district attorney has not in terms included the entire use of the mails by defendant in these bills. One count set forth one letter to a certain W. S. Burke, without identifying or in any manner describing its contents, and in the remaining counts it is averred that "divers" letters and packets, to wit, twenty, have been deposited, &c.

There is nothing in this language that imports that these were the only letters deposited by the defendant. How can it then be justly said that, as the entire use of the mails is included in these indictments, there could be no danger of a second conviction?

Indeed, in point of fact, the second conviction has already taken place. If the language of either indictment includes the entire use of the mails, it is equally true of both, for both indictments are similar. We have, then, the fact that after the defendant had been convicted on indictment No. 19 *for an entire use of the mails*, as alleged by the trial judge, he is convicted under indictment No. 20 *for a like entire use of the mails*, and is thus twice sentenced for the same offense. If it be answered that there is nothing to show that the offense under

indictment No. 20 was the same as the offense under indictment No. 19, the invalidity of the indictments is equally clear. Indictment No. 19 should have so closely identified the letters as to have made it impossible for the defendant to be tried and sentenced under indictment No. 20. The want of particularity makes it impossible to determine from the face of the indictments whether the letters in No. 19 and No. 20 are the same letters, or are different letters. The Government, therefore, seems to us to be caught on the horns of a dilemma. The offenses are either the same or they are different. We have either been twice convicted for one crime, or have been prevented from pleading a prior conviction by a failure of the indictments to show that the letters set forth in No. 20 were different letters from those set forth in No. 19. Indeed, it is a part of the history of the case, known to the learned counsel for the Government, that another indictment against the same defendant, arising out of the same state of facts, still remains untried, and that an attempt was made to force its trial at the May, 1895, session of the United States District Court for the Eastern District of Pennsylvania. Are we to be again prevented, when the case again comes up for trial, by the want of particularity of the indictments now under consideration, from proving, by a production of the record, that we had been already convicted, and that we could not be twice punished for the same offense?

How, then, can it be urged, as stated by the learned judge, in overruling our motion in arrest of judgment, that "it cannot be pretended that the defendant is in danger of a second conviction."

The case of United States *vs.* Fleming, cited and relied upon by the learned trial judge, was decided in 1884, before the Supreme Court decided that of *In re* Henry, 123 U. S., 372, the opinion in which was delivered in 1887.

The Fleming case seems to us to clearly contradict the decision in the Henry case, and it may therefore be questioned whether Judge Blodgett would again render the same decision. The error that pervades Judge Blodgett's opinion was that the gist of the offense under the statute is the fraud-

ulent scheme, and not the depositing or taking out of a letter. Thus he held that it was only necessary in the indictment to identify the scheme by a name, without setting forth the letters that were unlawfully deposited. This would be correct if the scheme is the offense, for in such event a description of the scheme would protect the defendant from a second conviction, without designating the letters deposited in connection therewith. In such a view of the statute the depositing of the letters is a mere incident of the offense, and might be considered in the nature of overt acts. Anything, therefore, that generally describes the scheme itself, makes it a single offense, irrespective of the number of letters deposited, and thus protects the defendant from a second conviction. Judge Blodgett emphasizes this view of the law by his construction of the last clause of the statute, which provides that the indictment may severally charge offenses to the number of three when committed within the same six calendar months. He says: "I can only say that this clause is somewhat difficult of construction, but I can only construe it to mean, and do so construe it, that three separate offenses—*that is, three separate frauds*—may be charged in the same indictment. The indictment in this case contains four counts, charging the defendants with mailing letters in consummation or execution *of one fraud only*. It seems to me that under this statute if these defendants, for illustration, had been indicted not only for using the post office in the execution of the artifice or scheme known as 'Fund W,' but also other counts had been added charging them with misuse of the post office in the execution of schemes known as 'Fund H' and 'Fund K,' they could all have been joined in the same indictment, which is a fair illustration of the construction which I gave, and the only one I can give, to that clause of this section."

It is quite certain that Judge Blodgett was by no means satisfied with his own construction. He admits the difficulty of the question and adopts his construction as the only possible one, although he apparently has doubts as to whether it is sound.

The Supreme Court, however, as above stated, in 1887 clearly

decided otherwise in the case of *In re* Henry, *ut supra*, in express language that the scheme was not the crime, but the use of the mails by the depositing of a letter. Said Chief Justice Waite, in considering the section of the statute above cited: "We have carefully considered the arguments submitted by counsel in behalf of the petitioner, but are unable to agree with him in the opinion that there can be but one punishment for all the offenses committed by a person under this statute within any one period of six calendar months. As was well said by the district judge on the trial of the indictment: 'The Act forbids, not the general use of the post office for the purpose of carrying out a fraudulent scheme or device, but the putting in the post office of a letter or packet, or the taking out of a letter or packet from the post office in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the Act.' It is not, as in the case of *In re* Snow, 120 U. S., 279, a continuous offense, but it consists of a single isolated act, and is repeated as often as the act is repeated." The Chief Justice concludes: "Under the present statute, three separate offenses, committed in the same six months, may be joined, but not more, and when joined there is to be a single sentence for all. That is the whole scope and meaning of the provision, and there is nothing whatever in it to indicate the intention to make a single continuous offense, and punishable only as such, out of what, without it, would have been several distinct offenses, each complete in itself."

This seems to us to dispose of the ground upon which Judge Blodgett rested his whole reasoning that the fraud or scheme, and not the depositing of the letters, was the offense.

The court below, in the case at bar, rested its decision upon the Fleming case, which in view of the later decision of the court of last resort can now no longer be considered law with respect to the question at issue.

Third.—The indictment, however, is further faulty because it is multifarious. The criminal law will not permit a man to be tried for sixty-one separate offenses at one and the same time. The Act of Congress in this case has limited the

number of separate offenses that can be included in one indictment under this statute. It says: "The indictment may severally charge offenses to the number of three when committed within the same six calendar months." It has been ruled that the offense is not the scheme, but the depositing of the letters, and that the depositing of each letter constituted a separate and distinct offense. *United States* vs. *Martin*, 28 Federal Reporter, 813. In re *Henry*, 123 U. S., 372. In the last named case, Chief Justice Waite said: "As was well said by the district judge on the trial of the indictment, 'The Act forbids, not the general use of the post office for the purposes of carrying out a fraudulent scheme or device, but the putting in the post office of a letter or packet, or the taking out of a letter or packet from the post office in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the Act. It is not, as in the case of In re *Snow*, 120 U. S., 274, a continuous offense, but it consists of a single isolated act, and is repeated as often as the act is repeated.'"

Applying this reasoning to the present indictment, we at once perceive that the pleader, in his excessive zeal, has violated the Act of Congress beyond the possibility of dispute. He avers in each of the counts but one, that in pursuance of the scheme, the defendant mailed, or caused to be mailed, twenty letters and circulars, and, as if to exclude the possibility that these might all have been addressed in one inclosure to a single person, he adds: "Directed respectively to the said divers persons, the names and addresses of whom are to this grand inquest unknown." It is too plain for argument, therefore, that the bills are defective by reason of too many offenses being included within the indictment, and it must therefore fall. The word "divers" also is too indefinite, as it gives defendant no due notice of the character of the charge. *Commonwealth* vs. *Updegraff*, 6 S. & R., 5. In that case, which charged a man with the erection of *divers* fish dams, Gibson, J., said: "But even where the very words are pursued, an indictment may be still insufficient, for the same precision of description as to the *individuality* of the offense charged

is as requisite in an indictment on a statute as if it were at common law. * * * To distinguish one instance from another, all necessary incidents of time, place, and circumstance must, as in other cases, be added. Here the error is that the defendant is not charged with one specific act or offense, but with 'divers' acts, each constituting a distinct offense, which is too general. The special manner of the first should appear, that the defendant may precisely know with what he is charged, and that he may be able to plead the very fact of which he is to be acquitted or convicted, to a second indictment for the same offense. Here the word 'divers' ascertains nothing."

Finally, there is no averment that these separate offenses were within the same six calendar months.

On the whole case, we submit most respectfully that the judgments should be reversed.

JAMES M. BECK,
WM. F. HARRITY,
HAMPTON L. CARSON.

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In the Supreme Court of the United States.

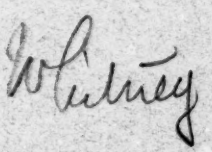
OCTOBER TERM, 1895.

JOHN H. DURLAND, PLAINTIFF IN error, v. THE UNITED STATES. } No. 528.

SAME v. SAME. } No. 529.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.



is as requisite in an indictment on a statute as if it were at common law. * * * To distinguish one instance from another, all necessary incidents of time, place, and circumstance must, as in other cases, be added. Here the error is that the defendant is not charged with one specific act or offense, but with 'divers' acts, each constituting a distinct offense, which is too general. The special manner of the first should appear, that the defendant may precisely know with what he is charged, and that he may be able to plead the very fact of which he is to be acquitted or convicted, to a second indictment for the same offense. Here the word 'divers' ascertains nothing."

Finally, there is no averment that these separate offenses were within the same six calendar months.

On the whole case, we submit most respectfully that the judgments should be reversed.

JAMES M. BECK,
WM. F. HARRITY,
HAMPTON L. CARSON.

Office Supreme Court U. S.
FILED.
OCT 26 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

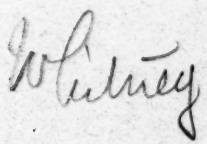
OCTOBER TERM, 1895.

JOHN H. DURLAND, PLAINTIFF IN error, v. THE UNITED STATES. — No. 528.

SAME v. SAME. — No. 529.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.



In the Supreme Court of the United States.

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SAME v. SAME. — No. 529.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

John H. Durland, the plaintiff in error, was twice indicted on November 19, 1894, for offenses under Revised Statutes, § 5480, as amended by the act of March 2, 1889, ch. 393, 25 Stat., 873. He was tried before Judge Butler and a jury, convicted under each indictment, and sentenced under each to five months' imprisonment in Philadelphia County prison and payment of the costs of prosecution.

There is no bill of exceptions in either record.

The statute under which plaintiff in error was indicted and convicted is as follows:

> If any person, having devised or intending to devise any scheme or artifice to defraud * * * to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Post-Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place or cause to be placed any letter, packet, writing, circular, pamphlet, or advertisement in any post-office * * * of the United States * * * such person so misusing the Post-Office establishment shall, upon conviction, be punishable. * * * The indictment, information, or complaint may severally charge offences to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence. * * *

The opinion of Judge Butler upon the motion in arrest of judgment is to be found in both records. His charge to the jury is reported at 65 Fed. Rep., 409, but is not material here.

THE INDICTMENTS.

The indictment in No. 528 charges that John H. Durland "did knowingly, willfully, and falsely devise a scheme and artifice to defraud—that is to say, by divers false pretenses and subtle means and devices, to obtain and acquire

for himself of and from divers persons to this grand inquest unknown a large sum of money, to wit, the sum of fifty dollars each," by representing that the Provident Bond and Investment Company (whether firm or corporation does not appear) would, upon payment of certain sums of money, issue a certain bond obligating itself to make certain payments yielding a profit of from 100 to 110 per cent on the investment. (See 20 Op., 748.)

Having set forth the bond scheme in detail, the indictment proceeds to charge that Durland, being president of said company, did not intend that the bonds would mature in accordance with their provisions, but that he "intended then and there by said false representations to obtain for his own use the sum of money paid by each of the said divers persons for said bond, to wit, the sum of fifty dollars each, which said scheme and artifice to defraud was to be effected by him, the said John H. Durland, opening a correspondence and communication with each of the said divers persons by means of the Post-Office Establishment of the United States," etc., and that in pursuance of this fraudulent scheme he did, on September 7, 1894, "place and cause to be placed in a post-office of the United States at Philadelphia, to be sent and delivered by the said Post-Office Establishment, divers letters and packets, to wit, twenty letters and circulars directed respectively to the said divers persons, the names and addresses of whom are to this grand inquest unknown."

The second count of the indictment charges a similar offense to have been committed June 1, 1893, by means of "twenty letters and packages directed, respectively, to

the said divers other persons, the names and addresses of whom are to this grand inquest unknown." (Record, No. 528, pp. 1–6.)

The indictment in No. 529 charges that on September 7, 1894, Durland devised a similar fraudulent scheme to obtain fraudulently from one W. S. Burk the sum of $60, and in pursuance of said scheme placed a letter in the post-office at Philadelphia addressed and directed to said Burk.

The second count of said indictment charged a conspiracy on July 20, 1893, similarly carried out by posting letters and packets to twenty other persons.

ASSIGNMENTS OF ERRORS.

The assignments of errors are similar in the two records. The record in No. 529 contains the opinion of Judge Butler upon a motion in arrest of judgment and for a new trial in that case, a part of which opinion is applicable to the questions raised in this proceeding. (Record, No. 529, pp. 7–11.)

We proceed to consider the assignments *seriatim*.

I. The first assignment of error claims that Durland was indicted for a different crime from that charged when he "was bound over." This seems not to require comment, especially as the proceedings prior to the indictment do not appear in the record.

II–IV. These assignments of error are based upon the refusal of the court to grant a motion made before

the trial to quash the indictment. A motion to quash is addressed to the discretion of the court, and therefore its denial can not be considered upon a writ of error. (*United States* v. *Rosenburgh*, 7 Wall., 580, 583; *United States* v. *Hamilton*, 109 U. S., 63; *Logan* v. *United States*, 144 U. S., 263, 282.)

V, VI. It is claimed that the motions in arrest of judgment should have been granted on the ground that the indictment failed to charge any scheme or artifice to defraud, or other offense under § 5480.

It is difficult to see how a scheme to defraud could have been more clearly set forth for the purposes of criminal pleading. It is not, of course, necessary or proper to set forth the evidence in such a bill. (*Stokes* v. *United States*, 157 U. S., 187, 191. See also *Coffin* v. *United States*, 156 U. S., 432, 448; *Cochran* v. *United States*, 157 U. S., 286, 290.)

Durland's counsel insist that no scheme to defraud was charged within the meaning of the law, because the bill charged simply that Durland intended to break a contract, and did not charge that he had made any misstatements of fact. The bill does charge very clearly a scheme or artifice to defraud. A similar point was urged and overruled under another section of the Revised Statutes in *Evans* v. *United States* (153 U. S., 584, 592). The act may be a fraud, although in the absence of special penal legislation it constitutes only a civil injury, not a crime, as in the case of indictments for conspiracy to defraud. (2 Bish. New Crim. Law, § 198.)

In *Evans* v. *United States*, *supra*, at pp. 590, 592, Mr. Justice Brown said:

> While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty, as well as to shield the innocent, and no impracticable standards of particularity should be set up, whereby the Government may be entrapped into making allegations which it would be impossible to prove. * * * If a person buy goods on credit in good faith, knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offense even if he be disappointed in making such payment. But if he purchases them, knowing that he will not be able to pay for them, and with an intent to cheat the vendor, this is a plain fraud, and made punishable as such by statutes in many of the States.

Defendant makes a curious argument, based on the principle *noscitur a sociis*, to the effect that general schemes to defraud are not within the act because they have no similarity to the "sawdust swindle," etc. The clauses upon which this argument is based were introduced in 1889. They show no sign of an intent to repeal or restrict the original scope of the section. It is not expressly repealed as counsel state; and repeals by implication are not favored. (*Ex parte Crow Dog*, 109 U. S., 556, and cas. cit.; *Chew Heong* v. *United States*, 112 U. S., 536, 549; *United States* v. *Langston*, 118 U. S., 389, 393.)

In *Brand* v. *United States* (4 Fed. Rep., 394, 398; Blatchford, J., 1880) the letter deposited in the mail sim-

ply made a promise that defendant did not intend to keep; and to the same effect are *United States* v. *Stickle* (15 Fed. Rep., 798; Bunn, J., 1883); *United States* v. *Flemming, infra; United States* v. *Ried* (42 Fed. Rep., 134), and *United States* v. *Staples* (45 Fed. Rep., 195; Severens, J., 1890); *United States* v. *Finney* (45 Fed. Rep., 41; Thayer, J., 1890), and *United States* v. *Beatty* (60 Fed. Rep., 740; Wheeler, J., 1894).

The uniform rulings of the Federal judges are thus opposed to the contention of plaintiff in error. It will be noticed that his argument is partly based on Revised Statutes, § 3894, which is a totally independent provision, based on a different section of the Post-Office act of 1872. That section, both in its original form and as amended by the act of September 19, 1890, ch. 908, provides for the offense of attempting through the mails to obtain money or property under false pretenses, as do also Revised Statutes, §§ 3929, 4041, amended by the same act. § 5480, evidently, is intended to accomplish some further result.

In *United States* v. *Flemming*, Pagin's Federal Precedents and Forms, 255, 261, Judge Blodgett, discussing the statute, says:

> Nor is it necessary that the scheme or artifice devised should be in itself unlawful. If the scheme was fraudulent, if the purpose was to get money from other persons under pretense of investing it for such persons, and not so to invest it, but to apply it to the use of the defendants, the case is within the statute. The object of the law was to prevent persons having fraudulent designs on others from using the post-office as a means of effecting such fraud. It need not, in my opinion, be a fraud either at

> common law or by statute. It is enough if it was a scheme or purpose to defraud any persons of their money.

It is stated by Mr. Pagin that this case was affirmed by Mr. Justice Harlan in the circuit court (p. 255).

It was claimed in the motions to quash that the indictments were defective for failing to set out specifically and particularly the contents and descriptions of the various letters and packets therein referred to. Defendant relies on *United States* v. *Hess* (124 U. S., 483), which does not support his contention, for in that case the indictment was held bad because it altogether failed to state the crime charged. A similar point was urged in *United States* v. *Flemming*, *supra*, by Messrs. W. C. Goudy and E. A. Storrs, on behalf of the defendants, and passed upon both by Judge Blodgett in the district court and Mr. Justice Harlan in the circuit court. That case also arose under § 5480 of the Revised Statutes. The scheme to defraud was very similar to that in the case at bar, and the indictment simply charged the mailing of "divers letters and packets, to wit, ten letters and ten packets directed, respectively, to divers persons and addresses to the said grand jurors as yet unknown." Judge Blodgett said:

> If the defendants, for the purpose of preparing for trial, wished a fuller description of these letters they could have obtained it by a bill of particulars, as the practice of this court for many years has been to require a bill of particulars to be furnished in ample time by the district attorney on application of the defendant in order to enable him to prepare for trial,

> and this practice seems to be sanctioned by well-considered authorities. * * * I do not think the pleader was obliged to set out these letters in full in the indictment, or give the substance of their contents, nor that it should appear from the letters that they were a part of a fraudulent scheme. Letters or circulars in execution of a fraudulent scheme might appear on their face to be wholly innocent and in all respects part of a legitimate transaction. * * * It seems to me enough if the defendants are told by the indictment to whom they sent letters and from whom they received letters through the post-office. The first two counts do not state to whom the letters were sent nor from whom they were received, but the grand jurors state to the court that they were sent to persons to the grand jurors unknown. If the defendants wished a particular description of the letters and packets which the prosecution would offer in evidence under these two counts, they should have applied to the court for a bill of particulars in apt time.

It hardly seems necessary to cite authority to the effect that the grand jury are not required to state the names and addresses upon the letters referred to in the indictment when they are unknown. (Wharton Crim. ed., § 97.) It may be that the mailing of these letters can be proved by the defendant's agent who mailed them, and that he, while remembering the contents of the circular letter and the time and place of mailing it, will not have paid any particular attention to the addresses on the envelope. (See *Coffin* v. *United States*, 156 U. S., 432, 451, 452; *United States* v. *Howell*, 64 Fed. Rep., 110, 112, and cas. cit.)

It is also claimed that the indictments are void because each charges more than three offenses, the mailing of

each letter being regarded as a separate offense. This objection was not taken until after verdict, and it does not appear that defendant was in any way prejudiced.

All of these objections would seem to be within the provisions of § 1025 of the Revised Statutes. (See *Connors* v. *United States*, 158 U. S., 408, 411.)

The indictment, however, would not be demurrable or subject to a motion in arrest of judgment simply because it charged too many offenses. This question was decided in a clear and convincing opinion by Judge Swing in *United States* v. *Nye* (4 Fed. Rep., 888). That case also arose under § 5480. Judge Swing says:

> At common law there could be no joinder of separate and distinct felonies. That was as well established at one period, at least, of the administration of the criminal law as if there had been an express statute forbidding the joinder of separate and distinct felonies in the same indictment; and yet it was never supposed that the joinder of several felonies destroyed the validity of the indictment. While the courts would not permit the party to be tried for two or more felonies in the same indictment, they would not quash the indictment, but would compel the prosecutor to elect the felony he would proceed to trial upon. * * * At common law in a case of that character it was always within the power of the prosecutor, when there was an improper joinder, to get clear of the difficulty and objection by entering a *nolle* as to a part of the counts, or the court would compel him to elect.

To the same effect is 1 Bishop Crim. Proc., § 449; and, in the similar case of duplicity in criminal pleading, id., § 443.

Does, however, either indictment charge more than two offenses? The statement that more than two offenses are charged is based upon certain language in the opinion of this court in the *habeas corpus* proceeding entitled *In re Henry*, 123 U. S., 372. In that case the petitioner had been twice indicted, each time for three different offenses, under § 5480. All six offenses were committed within the same six calendar months. Nevertheless, he was convicted and separately sentenced to imprisonment in each case. After serving out his term under the first sentence he applied for a writ of *habeas corpus*, which application was denied. Chief Justice Waite, however, in delivering the opinion of the court, quoted with approval the following remarks of the district judge:

> The act forbids, not the general use of the post-office for the purpose of carrying out a fraudulent scheme or device, but the putting in the post-office of a letter or packet, or the taking out of a letter or packet from the post-office, in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the act.

To these remarks the Chief Justice adds:

> It is not, as in the case of *In re Snow* (120 U. S., 274), a continuous offense, but it consists of a single isolated act and is repeated as often as the act is repeated.

Upon these remarks, literally construed, and upon a literal construction of the language of the statute, plaintiff in error bases the claim that the mailing of each letter constitutes a separate offense, *even if the letters are all mailed at the same moment and as a single act.*

The point actually decided in the Henry case was that the carrying out of a scheme to defraud by use of the mails during the period of six months is not one continuous act. It may not have been suggested, either to the district judge or to this court, that a question might arise whether each *mailing* constituted a single act, whether one letter or twenty or one hundred letters were mailed at the same moment. The mailing of these twenty letters may have been done with the same movement of the hand. They may have been in a sack handed in at the post-office window by Durland's clerk.

The subject is not, however, pursued further by us, because we do not understand that the point is available upon these writs of error.

VII, VIII. The points raised by these assignments have been already discussed.

IX. The second motion, or "surmotion," in arrest of judgment in each case raised the point that "it is not alleged that the various offenses charged in the indictment were committed within the six calendar months." As a matter of fact, each indictment expressly charges that the two counts relate to periods more than six months apart. For reasons above stated this would have been a proper ground for a motion to compel an election, but does not absolutely vitiate the indictment, and therefore is not available after verdict.

X. In each case plaintiff in error claims that he is improperly sentenced, because "there is nothing to show upon the face of the said bill of indictment that the let-

ters deposited and lodged in the mails were not the same letters which were the subject of the other case, and the defendant has therefore been twice sentenced for the same offense."

Counsel seems to suppose that each indictment must so fully and clearly describe the offense that in case of another indictment defendant could use it in support of a plea of former jeopardy without any oral evidence at all. This is, however, impossible. Oral evidence is always necessary to identify the parties, "even though the two indictments are alike." (1 Bish. Crim. Proc., § 816; *Dunbar* v. *United States*, 156 U. S., 185, 191.)

As a matter of fact, the indictments affirmatively show that they relate to different crimes. The first count of each indictment does, indeed, relate to acts committed September 7, 1894. In No. 528, however, these acts consist in attempts to cheat various persons out of the sum of $50 each, while in No. 529 they consist in an attempt to cheat one W. S. Burk out of $60. If there was a mistake in either date or amount, and the same letter was really referred to in each indictment, that fact would easily be made to appear. Till a mistake is proved the presumption is in favor of the indictment in this light.

It is respectfully submitted that each judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney General.

Office Supreme Court, U. S.
FILED.
OCT 29 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN H. DURLAND, PLAINTIFF in error,
v.
THE UNITED STATES.

Nos. 528 and 529.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

Thomas

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN H. DURLAND, PLAINTIFF in error, v. THE UNITED STATES. } Nos. 528 and 529.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

I desire to notice and combat but one point made by the attorneys for plaintiff in error, and that is the contention that a "scheme or artifice to defraud," within the meaning of section 5480, Revised Statutes, as amended by the act of March 2, 1889 (25 Stat. L., 873), does not "consist of the mere intention not to carry out a contract in the future." If I understand this contention right it is that the fraud or artifice contemplated by said section is nothing more nor less than the well-known crime of obtaining money or property under false pretenses, which

could be committed only by the misrepresentation of an existing or past fact, and not by a *false promise* to do something in the future. If that contention should be sustained by this court, the law, in my opinion, would be made nugatory, not only in its criminal aspect, but also in its relation to the administration of the postal service.

Congress, as early as 1827, prohibited postmasters from acting as lottery agents (4 Stat. L., 238, sec. 6), and again in 1868 declared by statute (15 Stat. L, 194, sec. 13) matter concerning lotteries nonmailable, but the first law forbidding the transmission through the mails of correspondence concerning schemes to defraud was that of June 8, 1872. (17 Stat. L., 283.) Section 149 of that act provided—

> That it shall not be lawful to convey by mail, nor to deposit in a post-office to be sent by mail, any letters or circulars concerning illegal lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretences, and a penalty of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution, is hereby imposed upon conviction, in any Federal court, of the violation of this section.

This was carried into the Revised Statutes as section 3894. Section 301 of the act was carried into the Revised Statutes as section 5480, and as that section is the one under which indictments in the case at bar were drawn, I give it as amended by the act of March 2, 1889, putting

the language inserted by the amendment in brackets, so as to show the section as it originally stood and as it stands now. It is as follows:

> If any person having devised or intending to devise any scheme or artifice to defraud [or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence by what is commonly called the "sawdust swindle," or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles], to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Post-Office Establishment of the United States, or by inciting such other person [or any person] to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place [or cause to be placed] any letter, packet [writing, circular, pamphlet, or advertisement] in any post-office [branch post-office, or street or hotel letter box] of the United States [to be sent or delivered by the said Post-Office Establishment], or shall take or receive any such therefrom, such person so misusing the Post-Office

Establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments [at the discretion of the court].

The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months, but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the Post-Office Establishment enters as an instrument into such fraudulent scheme and device.

Section 300 of the act was as follows:

That the Postmaster-General may, upon evidence satisfactory to him that any person, firm, or corporation is engaged in conducting any fraudulent lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind, or in conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretences, representations, or promises, forbid the payment by any postmaster to any such person, firm, or corporation of any postal money order drawn to the order or in favor of him or of them, and may provide by regulations for the return to the remitters of the sums named in such money orders. And the Postmaster-General may also, upon like evidence, instruct postmasters at any post-offices at which registered letters shall arrive directed to any such person, firm, or corporation, to return all such registered letters to the postmasters at the offices at which they were originally mailed, with the word "fraudulent" plainly written or stamped upon the outside of said letters; and all letters so returned to

> such postmasters shall be by them returned to the writers thereof under such regulations as the Postmaster-General may prescribe: *Provided*, That nothing in this act contained shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself.

This section was carried, without material change, into the Revised Statutes as sections 3929 and 4041, which are in force to-day, except that the word "fraudulent" before the word "lottery" was stricken out by the act of September 19, 1890. (26 Stat. L., 465.) The word "illegal" before the word "lottery" in section 3894 was stricken out by the act of July 12, 1876 (19 Stat. L, 90), and other important amendments of that section were made by the act of September 19, 1890, which it is not necessary to notice here, as they have no relation to the question under discussion. It should be constantly kept in mind that sections 3894 and 5480 originated as distinct in the act of June 8, 1872, and have been kept distinct ever since by subsequent legislation.

Sections 149 (sec. 3894, Rev. Stat.) and 301 (sec. 5480, Rev. Stat.) having been inserted in the same act, it is manifest Congress did not intend by them to cover the *same* ground; and this is made more apparent by the language of section 300 (secs. 3929 and 4041, Rev. Stat.) when it came to confer power on the Postmaster-General to prevent the use of the mails in conducting frauds. Section 300 may very well be regarded as defining what was meant by the words "scheme or artifice to defraud." By it the Postmaster-General was authorized to deny the use of the registry and money-order systems of the Post-

Office Establishment to anyone who he found, on evidence satisfactory to him, was "conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises."

Taking all this legislation together, it is apparent that Congress intended to strike principally at schemes devised to defraud the public in general. Section 5480 created a new offense, and that was to devise a scheme or artifice to defraud to be effected through the Post-Office Establishment. By the express terms of the section the crime may consist in simply *devising* a scheme to defraud to be effected through the mails, and in the execution of the scheme depositing a letter in a post-office, without having reached the point of having made false or fraudulent representations or promises, the bare intent to defraud in the future by means of the scheme or artifice being sufficient. This has been the uniform construction put on these statutes by the Postmaster-General. January 4, 1883, the Assistant Attorney-General for the Post-Office Department gave an opinion to the Hon. T. O. Howe, the then Postmaster-General, in which he used this language:

> In construing the statute, I have endeavored to observe the fundamental rule for the construction of statutes, by considering, first, the character of the evil sought to be suppressed, and second, the nature of the remedy sought to be applied, and herein the structure of the tribunal charged with the execution of the statute. First, then, as to the evil. What is meant by the phrase, "or in conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses,

representations, or promises?" Was it intended to include only what is technically a false pretense within the meaning of the criminal law?

I am clearly of the opinion that Congress did not use the term in this limited sense.

In the first place, in legislating for the Executive Departments, Congress is presumed to use words and terms in the sense in which they are understood by the public rather than in their technical sense.

In the second place, seemingly for the purpose of removing any doubt that might arise, the term "false" is enlarged upon and explained by the correlative term "fraudulent," and the term "pretense" is in like manner enlarged by the term "representations or promises."

So that the Postmaster-General is authorized to prohibit the use of the money-order or registry system to anyone engaged in obtaining money through the mails by means of false or fraudulent pretenses, false or fraudulent representations, or false or fraudulent promises.

In the view that I have taken the statute was designed to cover every conceivable form of fraud, where it is shown that the use of the mails constitutes an essential or important factor in the perpetration of such fraud.

Where it is shown that a party is carrying on a business through the mails which by reason of the worthless or trifling character of his goods he could not carry on if brought face to face with his customers, it presents a case to my mind for the application of the statute.

I do not mean to say that in dealing with his customers through the mails a party may not puff his goods, in the sense in which that term is understood. What I do mean to say is that a party

> soliciting orders through the mails is, in view of this statute (to say nothing of the ordinary obligations of honesty) bound to state at his peril practically and substantially what he proposes to sell. This description, too, must be addressed to the understanding of the class of people to whom his solicitations are sent. Knowing, as the advertiser does, that the parties whose patronage he solicits are, by reason of their remote localities, unable to make personal examination of his goods, he is bound in law as well as in morals to send in response to their remittances just such goods as by advertisement he leads them to suppose they will get.

That, it strikes me, is as clear a statement of the meaning of sections 5480, 3929, and 4041 as can be made.

Nine-tenths of the schemes the Postmaster-General finds to be fraudulent consist of the mere intention of the promoters not to carry out a promise in the future. It is true the Postmaster-General does not deny the use of the mails to anyone simply upon a supposition that he will not fulfill his promise in the future, but it is also true that he has no power to act under sections 3929 and 4041 in regard to frauds *already* perpetrated. When he finds a party, having *devised a scheme to defraud*, has defrauded some one, and is still advertising the same scheme, he denies the use of the mails to such party for the sole purpose of preventing the consummation of the fraud in the future. The history of the administration of the law in the Post-Office Department shows that two classes of frauds are common. First, where the promoters do not intend to do anything toward the execution of their promises, such as a promise to send some

article of value or to appoint agents at good salaries upon receipt of specified sums of money; second, where the promoters so adroitly contrive their schemes as to make the public believe one thing will be done when the promoter intends to do another. One party, for instance, advertised that he would give employment to parties for "writing at home."

When the victims sent their money they learned that the "writing at home" meant simply the writing of the letters they had already sent to the swindlers. Another used language calculated to make the public believe an article would be given free upon sending a small sum to pay for a periodical (devoted wholly to advertising fake concerns). This notice wound up by saying, "Send us the money and we will send you the paper and our offer." The money would be sent and the writer would receive the worthless paper and a printed slip headed, "Our offer," in which it was explained that upon receipt of the money for a club of subscribers, ranging from 5 to 50, the free article would be sent. Another party advertised a chinch-bug destroyer for $5. When the victim received the "destroyer" he found it to consist of two small paddles, and he was directed to catch the chinch bug, put it on one paddle, strike it with the other, and death would be instantaneous.

There are probably thousands of frauds of this character constantly advertised in our country by which the people are fleeced. The promoters of these schemes usually demand very small sums, so that the victims ordinarily rather than be put to the trouble and expense

of seeking redress submit; and such schemes as these are the ones Congress intended to suppress, so far as the mails are concerned.

This construction is also fortified by the amendment of the act of March 2, 1889. I have no doubt that some thought that to make out a case under section 5480 as it originally stood the promoter of the scheme must have intended to defraud the party with whom he dealt, and that as the vendor of counterfeit money informed his correspondent what he was to get, he would be guilty of no crime.

Hence the amendment. But in fact the amendment added nothing to the section because Judge Benedict, in 1882, in *United States* v. *Jones* (10 Fed. Rep., 469), distinctly held that the selling of counterfeit money to a party who knew what he was getting for the purpose of putting it off as good money, constituted an offense under section 5480 as it then stood, notwithstanding the absence of evidence showing an intention to defraud any *particular* person. Judge Benedict said: "Any scheme, the necessary result of which would be the defrauding of *somebody* is a scheme to defraud, within the meaning of section 5480." This ruling and this amendment point unerringly to the intent of Congress to prevent the use of the mails in the conduct of any scheme which is devised to defraud *generally*, and of course there may be a conviction by simply showing an *intent* to defraud by a scheme to be effected through the mails and by the actual use of the mails in executing it, though no false promise has been made to any particular person and no one has in fact

been deceived and defrauded. The mere *offering* of counterfeit money through the mails is sufficient, and it is also sufficient to constitute the crime to make any other offer through the mails with the intent to defraud somebody who may in the future be deceived by it.

The district and circuit courts of the United States have also given this construction to the law in the following cases, in all of which it was held to constitute the crime, to devise a scheme to obtain money or property by false promises made to the public generally to do something in the future: *Brand* v. *United States*, 4 Fed. Rep., 394; *United States* v. *Jones*, 10 Fed. Rep., 469; *United States* v. *Stickle*, 15 Fed. Rep., 798; *United States* v. *Reid*, 42 Fed. Rep., 134; *United States* v. *Finney*, 45 Fed. Rep., 41; *United States* v. *Staples*, 45 Fed. Rep., 195; *United States* v. *Beatty*, 60 Fed. Rep., 740; *United States* v. *Fleming*, Pagin's Prac. and Forms, 255.

In the case at bar the plaintiff in error has not saved any exceptions to the charge of the trial judge (65 Fed. Rep., 408) or the sufficiency of the evidence, and hence we must assume that the jury found, under a proper charge from the judge, that the averments of the indictment were true, which averments are, in substance, that plaintiff in error *devised a scheme to defraud* by representing that the Provident Bond Investment Company would pay money to its patrons which he at the time did not intend said company should pay; that this scheme was intended to be effected through the mails, and that in executing it he did use the mails, and this constitutes a crime under section

5480 according to its plain terms and the rulings of the Post-Office Department and the courts.

The other points raised by plaintiff in error are discussed by Mr. Whitney.

JOHN L. THOMAS,
Assistant Attorney-General for the
Post-Office Department.

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Office Supreme Court, U. S.
FILED.
MAR 2 1895
JAMES H. McKENNEY,
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In the Supreme Court of the United States.

OCTOBER TERM, 1894.

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v.
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JOHN H. DURLAND, PLAINTIFF IN error,
v.
THE UNITED STATES. } No. ~~512.~~ 529

MOTION TO ADVANCE.

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JOHN L. THOMAS,
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JOHN H. DURLAND, PLAINTIFF IN error, v. THE UNITED STATES. } No. 912.

MOTION TO ADVANCE.

The defendant in the above-entitled cases was tried upon two indictments for using the mails in furthering a scheme to defraud, in violation of the provisions of the act of March 2, 1889, ch. 393, 25 Stats., 873, amending section 5480 of the Revised Statutes, and was convicted. He has been admitted to bail in the sum of $2,000 on each indictment, pending the decision of this court on his writs of error.

In accordance with section 3 of rule 26, the Solicitor-General respectfully moves the court to advance the case